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CODE OF CIVIL PROCEDURE

OF

STATE OF IDAHO,

1901.

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COMMISSIONERS' CERTIFICATE.

UNITED STATES OF AMERICA,
STATE OF IDAHO.

We, the undersigned, constituting the Code Commission for the State of Idaho, do hereby certify that the laws contained in these volumes, known, respectively, as The Political Code, The Civil Code, The Code of Civil Procedure and The Penal Code of the State of Idaho, have been by us compared with and the same do constitute and include the present existing laws of the State of Idaho, except special and local laws.

Frank Martin.

*Attorney General,
Ex-Officio Member and Chairman.*

H. M. Ruick

Alfred A. Fraser

Members Code Commission for the State of Idaho.

Dated Boise, Idaho, this first day of November, 1901.

CODE OF CIVIL PROCEDURE.

PRELIMINARY PROVISIONS.

Section.

2979. Title of act and how divided.

Section.

2980. Civil and criminal remedies not merged.

Section 2979. Title of Act and how Divided: This act shall be known as the Code of Civil Procedure of the State of Idaho, and whenever cited, enumerated, referred to or amended, may be designated simply as the Code of Civil Procedure, adding, when necessary, the number of the Section. It is divided into seven Titles, as follows:

Title XV. Courts of Justice and Judicial Officers.

Title XVI. Civil Procedure in District Courts.

Title XVII. Civil Procedure in Probate and Justices' Courts.

Title XVIII. Miscellaneous Provisions.

Title XIX. Special Proceedings of a Civil Nature.

Title XX. Proceedings in Probate Courts Relating to Probate Matters.

Title XXI. Evidence.

1887 R. S. Sec. 3800; rewritten and titles added by Commission.

A SINGLE ACT: A Code passed by the legislature and signed by the governor, as a single statute, although treating of a variety of subjects, is to be considered a single act.—Earl v. Board of Education, 55 Cal. 489.

AMENDMENTS: The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law, from their original adoption, but the new or changed portions are not of retroactive effect.—C. P. R. Co. v. Shackelford, 63 Cal. 261.

PRELIMINARY PROVISIONS: General provisions relating to all the Codes, are inserted in the Political Code, Sec. 1 et seq.

In substance it is provided that the Codes shall not be retroactive; shall be liberally construed; deemed a continuation of existing statutes; shall not affect the tenor of existing officers;

courts; vested rights; proceedings pending; nor the statute of limitations; holidays are defined; rules provided for computation of time; construction of certain words and phrases used in the Code; the common law is retained.

CONSTRUCTION OF REMEDIAL STATUTES: All parts and sections relevant shall be considered together, and that interpretation placed upon the language which will give the particular section utility and effect and make it compatible with common sense and justice.—Burnham v. Hayes, 3 Cal. 115, 58 Am. Dec. 389.

Remedial statutes must be construed liberally and where the meaning is doubtful, it must be so construed as to extend the remedy.—Martin White v Steam-Tug Mary Ann, 6 Cal. 462, 65 Am. Dec. 523; Bracket v. Banegas, 99 Cal. 623, 34 Pac. 344; In re De Leon, 102 Cal. 541, 36 Pac. 864; People v. Dodge, 104 Cal. 492, 38 Pac. 203.

Section 2980. Civil and Criminal Remedies not Merged: When the violation of a right admits of both civil and criminal remedy, the right to prosecute the one is not merged in the other.

1887 R. S. Sec. 3801.

The common law doctrine that a civil action is merged in a felony, is

discussed in Rogers v. Huie, 1 Cal. 429, 54 Am. Dec. 300.

TITLE XV.

COURTS OF JUSTICE AND JUDICIAL OFFICERS.

Chap. CXVI. Designation.

Chap. CXVII. The Supreme Court.

Chap. CXVIII. The District Court.

Chap. CXIX. The Probate Courts.

Chap. CXX. Justices' Courts.

Chap. CXXI. General Provisions Respecting Courts of Justice.

Chap. CXXII. Judicial Officers.

Chap. CXXIII. Jurors.

Chap. CXXIV. Attorneys and Counsellors at Law.

CHAPTER CXVI.

DESIGNATION.

Section.

2981. The courts enumerated.

Section.

2982. Courts of record designated.

Section 2981. The Courts Enumerated: The following are the courts of justice of this State having jurisdiction in civil actions:

1. The supreme court;
2. The district courts;
3. The probate courts;
4. The justices' courts.

1887 R. S. Sec. 3810.

CONSTITUTIONAL PROVISIONS—JUDICIAL POWER OF STATE: The judicial power of the state and provisions for courts are contained in Sec. 2, Art. 5 of the constitution. Only courts having civil jurisdiction are enumerated in this Code.

Article 2 of constitution divides the power of the state government into three distinct departments: Legislative, executive and judicial and provides that no person exercising the powers of one shall exercise powers belonging to either of the others. Cases construing similar provisions of the California constitution are reviewed by the court in *People v. Provines*, 34 Cal. 520, in which it is held that the prohibition is applicable only to offices

of the state government proper, and not to county or municipal officers. This decision is followed in *Staudé v. Election Commissioners*, 61 Cal. 313.

Supreme court, organization and jurisdiction, Chap. CXVII, Secs. 2983 to 2992; appellate procedure in Chap. CLI, Secs. 3573 to 3593.

District courts, organization and jurisdiction, Chap. CXVIII, Secs. 2993 to 3001; actions and procedure, Chaps. CXXV to CXLIV.

Probate court, organization and jurisdiction generally, Chap. CXIX, Secs. 3002 to 3006; rules of practice and procedure in civil actions, Sec. 3594; jurisdiction and procedure in probate matters, Chaps. CLXXXV to CXCIX, Secs. 3993 to 4398.

Section 2982. Courts of Record Designated: The courts enumerated in the first three subdivisions of the preceding Section are courts of record.

1887 R. S. Sec. 3811.

Probate courts shall be courts of record.—Const. Art. 5, Sec. 21. In the exercise of their powers in civil actions, are courts of peculiar and limited jurisdiction.—Sec. 3696. The records and proceedings within its probate jurisdiction, only, are given the

verity of a court of record.—Sec. 3004.

The essentials of a court of record considered by Sawyer, J., in *Hahn v. Kelley*, 34 Cal. 391. Seal, not essential to constitute.—*Ex parte Theisleton*, 52 Cal. 520. The judgment roll is the record of a court of this class.—*Hahn v. Kelly*, 34 Cal. 391.

CHAPTER CXVII.

SUPREME COURT.

Section.

2983. Jurisdiction.

2984. Original jurisdiction.

2985. Appellate jurisdiction.

2986. Written decisions required.

2987. Presence of two justices.

2988. Concurrence of two justices.

Section.

2989. Number of terms and where held.

2990. May hold elsewhere in case of emergency.

2991. Order fixing terms.

2992. Where causes to be heard.

Section 2983: Jurisdiction: The jurisdiction of this court is of two kinds:

1. Original; and
2. Appellate.

1887 R. S. Sec. 3815.

RULES: Supreme court may make.
—Sec. 3015. Under Const. Art. 5, Sec.

13, the legislature has no authority to prescribe rules of practice for the supreme court.

Section 2984. Original Jurisdiction: Its original jurisdiction extends to the issuance of writs of mandamus, certiorari, prohibition, habeas corpus, and all writs necessary or proper to the exercise of its appellate jurisdiction. It shall also have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the legislature for its action.

1887 R. S. Sec. 3816, changing mandate to mandamus and review to certiorari to correspond with Art. V, Sec. 9, of Constitution and adding Sec. 10 of Art. V of Constitution.

Supreme court also has original jurisdiction in certain election contests. Sec. 3795.

ORIGINAL JURISDICTION GENERALLY: For the general powers of the supreme court and practice therein in the issuance of original writs, see chapters of this Code, mandamus, Sec. 3769 et seq., certiorari Sec. 3758 et seq., and prohibition, Sec. 3783 et seq.

ORIGINAL JURISDICTION, CERTIORARI: Certiorari will lie to review an order appointing a receiver, so as to determine from the case as presented to the lower court, whether jurisdiction existed in such court, in the particular case made, to appoint a receiver.—*Sweeney et al. v. Mayhew*, Judge (Idaho), 56 Pac. 85.

TO REVIEW ACTION OF COUNTY COMMISSIONERS: Writ of review does not lie from an action of a board

of county commissioners. The statutes having provided a speedy and adequate remedy by appeal.—*Rogers v. Hayes et al.*, County Commissioners (Idaho), 32 Pac. 259.

MANDAMUS: Where district court has refused a writ of mandamus, appeal and not original application for a writ in the supreme court, is the remedy.—*People v. Thompson*, 66 Cal. 398, 5 Pac. 686.

CLAIMS AGAINST THE STATE: Where the constitution provides a board for examination of claims against the state, and such board, for an unreasonable time, delays action upon a claim presented, while a writ of mandate will issue to require said board to proceed and pass upon such claim, the court has no jurisdiction to direct how such board shall act. (*Sullivan*, C. J. dissenting.)—*Pike v. Steunenberg et al.*, State Board of Examiners (Idaho), 51 Pac. 614.

Note: Section 6, Art. 10 of the constitution of Idaho, cited in dissenting opinion.

Section 2985. Appellate Jurisdiction: The appellate jurisdiction extends to a review, upon appeal, of all cases removed to it under such regulations as are or may be prescribed by law, from the decisions of the district courts, or of any judge thereof.

1887 R. S. Sec. 3817 as modified by Sec. 9, Art. V, Const.

APPELLATE JURISDICTION: Generally Chapter CLI.

WRITS: Supreme court may issue all writs necessary or proper to the complete exercise of its appellate jurisdiction.—Const. Art. 5, Sec. 9.

For a discussion of the power of appellate court to issue such writs in the exercise of appellate jurisdiction see

People v. Turner, 1 Cal. 143, 52 Am. Dec. 295, and note following: Our supreme court, however, under the express provisions of the constitution, Art. 5, Sec. 9, has original jurisdiction to issue writs of mandamus, certiorari prohibition and habeas corpus.

Section 2986. Written Decisions Required: The decisions of the supreme court shall be in writing.

1887 R. S. Sec. 3818, part of section. The remainder of the section, which relates exclusively to the power and procedure of the court in appellate proceedings, is transferred to the chapter on appeals.—Sec. 3591.

It was held under a similar statute in *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565, that the legislature could

not require the supreme court to give the reasons for its decisions in writing. Under the provisions of Const. Art. 5, Sec. 13, expressly excepting the supreme court from legislative control in the method of its proceedings, it would seem that the methods of rendering its decisions rests in the discretion of the court.

Section 2987. Presence of Two Justices: The presence of two justices is necessary for the transaction of business, but one of the justices may adjourn the court from day to day with the same effect as if all were present.

1887 R. S. Sec. 3819.

Section 2988. Concurrence of Two Justices: The concurrence of two justices is necessary to pronounce a judgment; if two do not concur, the case must be reheard.

1887 R. S. Sec. 3820.

Section 2989. Number of Terms and Where Held: At least four terms of the supreme court shall be held annually; two terms at the seat of State government, and two terms at the city of Lewiston, in Nez Perce county.

Con. Art. V, Sec. 8.

Section 2990. May Hold Elsewhere in Case of Emergency: In case of epidemic, pestilence, or destruction of court houses, the justices may hold the terms of the supreme court provided by the preceding Section at other convenient places, to be fixed by a majority of said justices.

Con. Art. V, Sec. 8.

Section 2991. Order Fixing Terms: The supreme court, or any two of the judges thereof, may, by an order, fix the times for holding the terms of the supreme court, which shall not be changed oftener than twice in each year; but additional terms may also be held by order of the court.

1899, 5th Ses. p. 6; 1891, 1st Ses. p. 11; portion from R. S. 1887, Sec. 3821.

Section 2992. Where Causes to be Heard: Unless by agreement of parties causes in which writs of error or appeals are taken to the supreme court of the State of Idaho from the counties of Kootenai, Shoshone, Latah, Nez Perce and Idaho or counties hereafter created therefrom, shall be heard at Lewiston; and causes in which writs of error or appeals are taken to said supreme court, from the

counties of Ada, Boise, Owyhee, Elmore, Cassia, Logan, Alturas, Oneida, Bear Lake, Bingham, Lemhi, Washington, Custer and Canyon, or counties hereafter created therefrom, shall be heard at Boise City: *Provided*, That in criminal cases, writs of error, habeas corpus, certiorari and appeals, may on motion of defendant be heard before the supreme court either at the city of Lewiston or at Boise City.

1899, 5th Ses. p. 6; 1893, 2d Ses p. 63.

CHAPTER CXVIII.

THE DISTRICT COURTS.

Section.

2993. District courts established.
2994. Judicial districts.
2995. Original jurisdiction.
2996. Appellate jurisdiction.
2997. Fixing time for holding terms.

Section.

2998. Special terms, order for.
2999. Number and duration of terms.
3000. Adjournments.
3001. Judgments and orders entered in vacation.

Section 2993. District Courts Established: District courts are hereby established, to be held in each of the counties of this State which have been or may hereafter be organized by law, for the purpose of hearing and determining all matters and causes arising under the laws of the State.

1887 R. S. Sec. 6146.

Section 2994. Judicial Districts: The State is divided into five judicial districts constituted of the following counties, respectively:

First district, Shoshone and Kootenai.

Second district, Latah, Nez Perce and Idaho.

Third district, Washington, Ada, Boise, Owyhee and Canyon.

Fourth district, Blaine, Lincoln, Cassia, Custer and Elmore.

Fifth district, Bear Lake, Bingham, Oneida, Fremont, Bannock and Lemhi.

Con. Art. V, Sec. 24, as modified by 1899, pp. 127 and 201; laws 1891, p. 189; creation of new counties.—See laws 1893, p. 17.

Section 2995. Original Jurisdiction: The district court has original jurisdiction:

1. In all cases both at law and in equity.
2. In all special proceedings.
3. To issue writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of its powers.
4. In the trial of all indictments and informations.

1887 R. S. Sec. 3830, as modified by Con. Art. V, Sec. 20.

Jurisdiction to try and determine prosecutions upon information.—1899, 5th Ses. p. 125, Sec. 1. Penal Code, Sec. 5327.

AMOUNT IN CONTROVERSY: The jurisdiction is not limited by a minimum amount in controversy, but costs cannot be recovered in district court in actions wherein justices courts have concurrent jurisdiction, except where the amount recovered or the value of

the property involved is one hundred dollars or over.—Secs. 3719 and 3723.

WRITS: District courts may issue writs of certiorari, Sec. 3758; mandamus, Sec. 3769; also writs of prohibition, Sec. 3783.

ELECTION CONTESTS: Have jurisdiction in certain election contests.—Secs. 3796 and 3797.

COURT RULES: Power to make and when to take effect.—Secs. 3014 and 3015.

Jurisdictions in action to determine adverse claims to mining locations: Sec. note 3379.

CONSTRUCTION OF STATUTE: Before a court of general original jurisdiction can be ousted of it, the statute must contain words of exclusion, or its language must be so free from ambiguity as to leave no doubt of the intention of the legislature.—*Greathouse v. Heed*, 1 Idaho, 494.

JURISDICTION AND REGULARITY PRESUMED: Every presumption and intendment of law is in favor of the regularity of a judgment of a court of general jurisdiction, and to overcome such presumption, in a suit brought to have such judgment declared void, facts must be alleged and proven showing wherein the court failed to obtain jurisdiction to render the judgment which is so attacked.—*Ollis v. Orr* (Idaho), 56 Pac. 162; see also *Campe v. Lassen*, 67 Cal. 139, 7 Pac. 430.

JURISDICTION — DETERMINED FROM SUBJECT MATTER: It must be determined from the subject matter of the action, and not from the title of the court, whether the action is one arising under the laws of the United States or of the Territory.—*Pickett v. United States*, 1 Idaho, 523.

IN EQUITY ACTION: The fact that the property is not within the jurisdiction of the court constitutes no bar in a court of equity, for a court of equity acts upon the person.—*Gamble v. Dunwell et al.* 1 Idaho, 268; see also *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89 and note at page 95. And may have jurisdiction in actions between non-residents, where the contract is made and to be performed within the state.—*Loaiza v. Superior Court of San Francisco*, 85 Cal. 11, 24

Pac. 707, 20 Am. St. Rep. 197 and note page 212.

CUSTODY OF INFANT CHILDREN: Jurisdiction of the care and custody of infant children is committed to the district courts and the judges thereof.—*In re Miller* (Idaho), 43 Pac. 870.

TO DETERMINE RIGHTS OF PARTIES TO OFFICE: The district court has jurisdiction to determine the rights of several parties who claim to be entitled to the office of sheriff.—*People ex rel. Houston v. Lindsay*, 1 Idaho, 394.

CORRECTING ERROR IN DECREE—PROCEDURE—BILL OF REVIEW: Leave to file a bill of review, which seeks to correct an error not apparent upon the decree which it seeks to reverse, is within the discretion of the court, and after a defendant has demurred to such bill he cannot raise an objection to the right of the plaintiff to file it. To avail himself of such objection, he should move the court on his first appearance to strike the bill from the files or to dismiss the suit.—*Hyde v. Lamberson et al.* 1 Idaho, 539.

WRIT TO ENFORCE JUDGMENT RENDERED AT CHAMBERS: A judge of the district court does not exceed his jurisdiction by issuing an order or a writ to enforce a judgment rendered by him at chambers.—*People ex rel. Houston v. Lindsay*, 1 Idaho, 394.

MISDEMEANOR — INDICTMENT—CONCURRENT JURISDICTION: Upon the trial of an indictment in the district court, where the evidence discloses a petty offense, within the jurisdiction to a justice court, it is true there will be a concurrent jurisdiction between justice courts and the district court, and it is absolutely necessary for the better administration of justice that this concurrent jurisdiction should exist.—*People v. Maxon*, 1 Idaho, 330.

Section 2996. Appellate Jurisdiction: Its appellate jurisdiction extends to all cases arising in probate or justices' courts; and to all other matters and cases wherein an appeal is allowed by law.

1887 R. S. Sec. 3830, Sub. 7.

Appeals from justices courts, provided for in Chap. CLXII, Secs. 3683 et seq. Appeals from probate court to

district court in probate matters. Chap. CXCIX, Secs. 4399 et seq.

Appeals from actions of board of county commissioners to district court are provided for in Political Code.

Section 2997. Fixing Time for Holding Terms: The judge of the district court of each of the judicial districts of the State must, annually, fix the time for holding the district court in the several counties of his district by an order filed and entered by the clerk in each county of his district, and said order must be published two consecutive weeks in a newspaper published in his district.

1899, 5th Ses. p. 3; 1891, 1st Ses. p. 4.

Section 2998. Special Terms. Order for: A special term of the district court may be held in any county, by an order of the judge of the district fixing the time of holding the same, and such order must be published for two consecutive weeks in some newspaper printed in the county in which the special term is to be held, and in case no newspaper is printed in the county, then in some newspaper printed in the State nearest to the county in which said special term is to be held.

1899, 5th Ses. p. 3; 1891, 1st Ses. p. 4.
ABSENCE OF JUDGE: Procedure when judge does not appear on day appointed.—Sec. 3019.

ETC.: Revoking order and changing place, by reason of.—Secs. 3021 and 3022.

INSURRECTION, PESTILENCE,

SICKNESS OF JUDGE: Judge of another district may hold.—Sec. 3027.

Section 2999. Number and Duration of Terms: There must be held at least two terms of the district court in each county in each year and each term must continue until the business is disposed of, or until a day fixed for the commencement of some other term in the district.

Const. Art. V, Sec. 11; 1887 R. S. Sec. 3831.

Section 3000. Adjournments: The court may adjourn from time to time during the term, and may, when the public convenience requires, adjourn the term over the time fixed by law for the commencement of another term in the same district.

1887 R. S. Sec. 3832.

Section 3001. Judgments and Orders Entered in Vacation: Judgments and orders of this court may be entered either in term or vacation.

1887 R. S. Sec. 3833.

JUDGMENT—ENTRY IN VACATION: Where in an action on a judgment, a record on appeal shows that the cause was heard and evidence taken in open court and that by agreement of parties, it was taken under advisement to be decided in vacation, an objection

that a judgment rendered was void because rendered in vacation is untenable, as by civil practice act, Sec. 29 (same as above section), final judgment may be entered in term time or vacation.—Shenk v. Birdseye, 2 Idaho, 130, 6 Pac. 128.

CHAPTER CXIX.

THE PROBATE COURTS.

Section.

3002. Court in each county.

3003. Jurisdiction of probate court.

3004. Presumptions as to probate proceedings.

Section.

3005. Terms in the several counties.

3006. Terms, where held. Clerk.

Section 3002. Court in Each County: There must be a probate court held in each of the counties.

1887 R. S. Sec. 3840.

Section 3003. Jurisdiction of Probate Court: The probate court has jurisdiction:

1. To open and receive proof of last wills and testaments and to admit them to proof;

2. To grant letters testamentary of administration and of guardianship, and to revoke the same;
3. To appoint appraisers of estates of deceased persons;
4. To compel executors, administrators and guardians to render accounts;
5. To order the sale of property of estates, or belonging to minors;
6. To order the payment of debts due from estates;
7. To order and regulate all distributions of property or estates of deceased persons;
8. To compel the attendance of witnesses and the production of title deeds, papers and other property of an estate or of a minor;
9. To make such orders as may be necessary to the exercise of the powers conferred upon it.

In addition to their probate jurisdiction to hear and determine all civil causes wherein the damage or debt claimed does not exceed the sum of five hundred dollars, exclusive of interest, and concurrent jurisdiction with justices of the peace in criminal cases.

1887 R. S. Sec. 3841.

Jurisdiction generally, see Const. Art. 5, Sec. 21.

JURISDICTION IN PROBATE MATTERS: As affected by the residence of decedent and situs of estate. Secs. 3993 and 3994.

JURISDICTION IN CIVIL ACTIONS: In the exercise of its powers in civil causes its process, pleadings, rules of practice, etc., follow those of the district court when the amount in controversy exceeds three hundred dollars, otherwise, those of the justice's court; Sec. 3696. Jurisdiction in forcible entry and detainer proceedings, Sec. 3979.

JURISDICTION — LEGISLATIVE POWER TO CONFER UNDER ORGANIC ACT: When the act of congress of December 13, 1870, had invested the probate courts with enlarged jurisdiction, it was competent for the territorial legislature to limit and define its character, and to extend it, except as to the amount involved. It was therefore competent for the legislature to provide that the jurisdiction of the district court and probate court, in certain cases, should be concurrent, as is provided by the act of January 11, 1871.—*Greathouse v. Heed*, 1 Idaho, 494.

WHEN JURISDICTION ESTABLISHED PRESUMPTION OF REGULARITY PREVAILS: When the existence of jurisdiction of inferior courts, of which the probate court is one, is proved or conceded, the maxim *omnia rite acta* applies to them as well as to courts of general jurisdiction, and every intendment must be in support of the proceeding.—*Glendenning v. McNutt*, 1 Idaho, 592.

IRREGULAR PROCEEDINGS WITHIN JURISDICTION VOIDABLE ONLY: Jurisdiction of the subject matter is one thing and the exercise of it another. An irregular or erroneous exercise of its jurisdiction by a probate court will not render its proceedings void, but voidable only.—*Glendenning v. McNutt*, 1 Idaho, 592.

NO APPELLATE JURISDICTION: Appellate jurisdiction cannot be conferred upon the probate court by the legislature.—*Constitution*, Art. V, Sec. 21; *Moore v. Koubly*, 1 Idaho, 55.

CONSTABLE MAY EXECUTE PROBATE EXECUTION: In certain cases, a constable may execute and return an execution issued out of a probate court, and may justify under it, if it is valid on its face.—*Coombs v. Collins* (Idaho), 57 Pac. 310.

JURISDICTION, HOW FAR EXCLUSIVE IN PROBATE MATTERS: The jurisdiction over the settlement of estates, etc., formerly rested in courts of chancery. The probate system of Idaho is very comprehensive and complete in detail, and under it this court takes original cognizance of all administrations and is clothed with sufficient power for all ordinary purposes. The district court, however, in the exercise of its equity jurisdiction will interpose in special cases, wherein the remedy has not been granted by statute to the probate court for which its methods are inadequate or where its proceedings require correction.—*Dick v. Gerke*, 12 Cal. 433, 73 Am. Dec. 555, and note following page 558. For a case holding that courts of chancery retain all their original jurisdiction and that probate courts are of special and limited juris-

diction.—Clark v. Perry, 5 Cal. 58, 63 Am. Dec. 82. California cases under a statute, containing the same provisions as Sec. 3004, hold that probate courts are not of limited and inferior jurisdiction.—Erwin v. Scriber, 18 Cal. 499; Halleck v. Moss, 22 Cal. 266; Lucas v. Todd, 28 Cal. 182. The tendency of later decisions, which mention, but which do not seem to be controlled by the provisions of the new constitution, is to limit the exercise of the jurisdiction of equity courts to cases where the inadequacy of the probate procedure is apparent and the necessity imperative to secure the proper administration.—Auguisola v. Arnaz, 51 Cal. 435; Rosenberg v. Frank, 58 Cal. 387; Siddal v.

Harrison, 73 Cal. 560, 15 Pac. 130; McDaniel v. Patterson, 98 Cal. 86, 32 Pac. 805.

Idaho Const. Art. 5, Secs. 20 and 21, grants general equity jurisdiction to district court, and general probate jurisdiction to probate courts, and would seem to limit probate jurisdiction in district courts to that ordinarily administered by courts of equity at the time of the adoption of the constitution, and should be construed as a continuation of existing jurisdiction rather than as a grant of new or exclusive jurisdiction to the probate courts, or a limitation of the jurisdiction of the district court.

Section 3004. Presumptions as to Probate Proceedings: The proceedings of this court are construed in the same manner and with like intendments as the proceedings of courts of general jurisdiction, and to its records, orders, judgments and decrees there is accorded like force, effect and legal presumptions as to the records, orders, judgments and decrees of district courts, *Provided*, That this Section shall be applicable to its probate proceedings, records, orders, judgments and decrees only.

1887 R. S. Sec. 3842.

Shall be courts of record, Const. Art. 5, Sec. 21.

In the exercise of its powers in civil

causes the probate court is of peculiar and limited jurisdiction and not a court of general jurisdiction. Sec. 3696.

Section 3005. Terms in the Several Counties: The terms of the probate courts in the several counties for the transaction of all probate business, except that specially authorized by law to be done in vacation, must be held on the fourth Monday in each month. For the transaction of all civil, other than probate business, and all criminal business, these courts are always open.

1887 R. S. Sec. 3843.

Section 3006. Terms, Where Held. Clerk. The terms of the probate courts must be held at the county seats. There shall be a clerk of said court to be appointed by the judge thereof or the probate judge may act as clerk of his own court. Every probate judge shall be responsible upon his official bond, for every default or misconduct in office of his clerk.

1887 R. S. Sec. 3844.

CHAPTER CXX.

JUSTICES' COURTS.

Section.

3007. Justice must hold court, where.

3008. Civil jurisdiction.

Section.

3009. Jurisdiction restricted.

3010. Jurisdiction extends to county.

Section 3007. Justice Must Hold Court Where: Every justice of the peace must hold a justice's court in the precinct or city for which he is elected or appointed.

1887 R. S. Sec. 3850.

Practice and procedure generally, see Title 17, Secs. 3594 et seq.

In cases of sickness, disability or necessary absence of a justice of the peace at the time ordered for trial, he

may request another justice of the precinct to take his place, who then has the same jurisdiction as though the matter was originally before him.—Sec. 3693.

Section 3008. Civil Jurisdiction: The civil jurisdiction of these courts within their respective precincts or cities extends:

1. To an action arising on contract, for the recovery of money only, if the sum claimed does not exceed three hundred dollars;

2. To an action for damages to the person, or for taking or detaining personal property, or for injuring personal property, or for an injury to real property, where no issue is raised by the answer involving the plaintiff's title, or possession of the same, if the damages claimed do not exceed three hundred dollars;

3. To an action for a fine, penalty or forfeiture, not exceeding three hundred dollars, given by statute or the ordinance of an incorporated city;

4. To an action upon a bond or undertaking conditioned for the payment of money not exceeding three hundred dollars, though the penalty exceed that sum; the judgment to be given for the sum actually due. When the payments are to be made by installments, an action may be brought for each installment as it becomes due;

5. To an action to recover the possession of personal property when the value of such property does not exceed three hundred dollars;

6. To take and enter judgment on the confession of a defendant, when the amount confessed does not exceed three hundred dollars.

1887 R. S. Sec. 3851.

JURISDICTION: Const. Art. 5, Sec. 22. Of peculiar and limited jurisdiction, Sec. 3696. In forcible entry and detainer proceedings. Sec. 3980.

JURISDICTION—CONSTITUTIONAL LIMITATION: Under the provisions of section 3851, Rev. St., justice courts, in actions arising on contracts for the recovery of money only, have jurisdiction where the sum claimed does not exceed the sum of \$300.—Quayle v. Glenn et al. (Idaho), 57 Pac. 308.

The sum claimed, including damages or principal and interest thereon, cannot exceed the sum of \$300.—Quayle v. Glenn et al. (Idaho), 57 Pac. 308.

Section 22, Art. 5, Const., Idaho, fixes the maximum beyond which the legislature cannot go in fixing such jurisdiction as to the value of property claimed or amount in controversy.—Quayle v. Glenn (Idaho), 57 Pac. 308.

Jurisdiction, facts conferring, not presumed, must be affirmatively shown when any rights are claimed by virtue of the judgment.—Mallett v. Gold and Silver Mining Co. 1 Nev. 188, Am. Dec. 484, and note following; McDonald v. Prescott, 2 Nev. 109, 90 Am. Dec. 517 and note, but facts not in writing or required by the statute to be entered in the docket or made part of the files may be shown by parol.—Jolley v. Foltz, 24 Cal. 321.

Section 3009. Jurisdiction Restricted: The jurisdiction conferred by the last Section shall not extend however to a civil action in which the boundaries, title or possession of real property is put in issue.

1887 R. S. Sec. 3852. Amended by inserting word "boundaries" on authority of Art. V, Sec. 22, Const.

Provision for transfer to district court where question of title raised by answer, Sec. 3601. *

This court has jurisdiction in actions

for trespass where right of possession not put in issue.—Pollock v. Cummings, 38 Cal. 683; Cornett et al. v. Bishop, 39 Cal. 319. Tenant's answer denying plaintiff's title and alleging title in third person under whom defendant entered does not put title in issue.—Ghiradelli

v. Green, 56 Cal. 629. The question of title must be directly and not merely incidentally involved, and unless the complaint states a case outside of the court's jurisdiction, it cannot be ousted

except on the filing of a verified complaint raising the issue as required by Sec. 3601.—See Schroeder v. Wittram, 66 Cal. 636, 6 Pac. 737.

Section 3010. Jurisdiction Extends to County: Mesne and final process of justices' courts may be issued to any part of the county in which they are held.

1887 R. S. Sec. 3853.

Subpoenas and executions, Sec. 3690.
Summons in certain cases may be

served outside of county, Sec. 3610.

Absconding debtors may be arrested in any part of the state, Sec. 3624.

CHAPTER CXXI.

GENERAL PROVISIONS RESPECTING COURTS OF JUSTICE.

Section.

SITTINGS, POWERS AND RULES.

3011. Sittings public.

3012. Limitations on preceding section.

3013. Powers respecting the conduct of judicial proceedings.

3014. Courts of record may make rules.

3015. When rules take effect.

SUNDAY AND HOLIDAYS.

3016. Days on which court may be held.

3017. Shall not be open on certain days.

3018. Court so appointed deemed for next day.

Section.

ADJOURNMENT—PLACE OF HOLDING.

3019. Adjournment of court for absence of judge.

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3021. Emergency, change place of holding.

COURTS OF JUSTICE.

3022. Parties to appear at place appointed.

3023. Rooms, etc., when judge may order.

COURT SEALS.

3024. What courts may have seals.

3025. Seals, by whom kept.

3026. Seal, to what proceedings affixed.

SITTINGS, POWERS AND RULES.

Section 3011. Sittings Public: The sittings of every court of justice are public, except as provided in the next Section.

1887 R. S. Sec. 3860.

Section 2012. Limitation on Preceding Section: In an action for divorce, criminal conversation, seduction, or breach of promise of marriage, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses, and counsel; *Provided*, That in any cause the court may, in the exercise of a sound discretion during the examination of a witness, exclude any and all witnesses in the cause.

1887 R. S. Sec. 3861.

This section does not authorize the court to make an order that no public report or publication of the testimony be made, and such publication by a per-

son not a party or a witness in the action cannot be punished as a contempt.—In re Shortridge, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78.

Section 3013. Powers Respecting the Conduct of Judicial Proceedings: Every court has power:

1. To preserve and enforce order in its immediate presence;
2. To enforce order in the proceedings before it or before a per-

son or persons empowered to conduct a judicial investigation under its authority;

3. To provide for the orderly conduct of proceedings before it or its officers;

4. To compel obedience to its judgments, orders and process, and to the orders of a judge out of court in an action or proceeding pending therein;

5. To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto;

6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this Code;

7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties;

8. To amend and control its process and orders, so as to make them conformable to law and justice.

1887 R. S. Sec. 3862.

For general provisions relating to proceedings in court, see also Chap. CLXX, Secs. 3738 et seq.

Power of judicial officers, Secs. 3034 et seq.

Contempts, Secs. 3819 et seq.

In justice courts, Secs. 3669 et seq.

Attendance of witnesses, Secs. 4000 et seq.

Administration of oaths, Secs. 4477 et seq.

AMENDMENT AND CONTROL OF PROCESS AND ORDERS: The right "to amend and control its process and

orders so as to make them conformable to law and justice" is expressly given to every court by the provisions of subdivision 8, section 3862, Rev. St., Idaho, (above section), and this power was exercised by the probate court in proper time. Rehearing denied.—*People ex rel. Chemung Min. Co. v. Cunningham* (Idaho), 53 Pac. 451.

MINUTES OF THE COURT—AMENDMENT: The trial court has authority to amend its minutes to conform to the fact at any time during the term.—*State v. Griffin* (Idaho), 40 Pac. 60.

Section 3014. Courts of Record May Make Rules:

Every court of record may make rules not inconsistent with the laws of this State, for its own government and the government of its officers, but such rules must neither impose a tax or charge upon any legal proceeding nor give an allowance to any officer for services.

1887 R. S. Sec. 3863.

COURT RULES: Are prescribed as a convenience to the court in the dispatch of business, and parties cannot by stipulation abrogate their conditions.—*Reynolds v. Laurens*, 15 Cal. 101, but the court may suspend when the ends of justice require.—*Prickett v. Wallace*, 54 Cal. 174, but in the case of *Hanson v. McCue*, 43 Cal. 178, it was held that courts and suitors are alike bound by the rules, which should re-

ceive a like construction as statutes. A rule which deprives a party of a statutory right is void.—*People v. McClellan*, 31 Cal. 101. It was held, however, in *Conneau v. Geis*, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785, that a rule requiring the prepayment of jury fees, is a reasonable requirement and valid.

Supreme court rules, Const. Art. 5, Sec. 13, vests the power to make rules for its own guidance exclusively in the court.

Section 3015. When Rules Take Effect: The rules adopted by the supreme court take effect sixty days, and those adopted by other courts, thirty days after their publication.

1887 R. S. Sec. 3864.

SUNDAY AND HOLIDAYS.

Section 3016. Days on Which Court May be Held:

The courts of justice may be held and judicial business be transacted on any day except as provided in the next Section.

1887 R. S. Sec. 3865.

Section 3017. Shall not be Opened on Certain Days:

No court can be opened nor can any judicial business be transacted on Sunday, on the first day of January, on the fourth day of July, on Christmas, or Thanksgiving day, or on a day on which the general election is held, except for the following purposes.

1. To give, upon their request, instructions to a jury when deliberating on their verdict;

2. To receive a verdict or discharge a jury;

3. For the exercise of the powers of a magistrate in a criminal action or in a proceeding of a criminal nature: *Provided*, That in civil causes orders of arrest may be made and executed; writs of attachments, executions, injunctions and writs of prohibition may be issued and served; proceedings to recover possession of personal property may be had; and suits for the purpose of obtaining any such writs and proceedings may be instituted on any day.

1887 R. S. Sec. 3866.

Section 3018. Court so Appointed, Deemed for Next Day: If any of the days mentioned in the last Section happen to be the day appointed for the holding of a court or to which it is adjourned, it is deemed appointed for, or adjourned to the next day.

1887 R. S. Sec. 3867.

ADJOURNMENT—PLACE OF HOLDING.

Section 3019. Adjournment of Court for Absence of Judge: If no judge attend on the day appointed for holding the court, or on the day to which it may have been adjourned, before noon, the sheriff or clerk must adjourn the court until the next day at ten o'clock a. m.; and if no judge attend on that day before noon, the sheriff or clerk must adjourn the court until the following day at the same hour, and so on from day to day for one week, unless the judge by written order directs it to be adjourned to some day certain fixed in said order, in which case it shall be so adjourned.

1887 R. S. Sec. 3868.

Section 3020. Same: If no judge attend for one week and no written order is made as provided in the last Section, the sheriff or clerk shall adjourn the session until the time appointed for the holding of the next regular session.

1887 R. S. Sec. 3869.

Section 3021. Emergency, Change Place of Holding: A judge authorized to hold or preside at a court appointed to be held in a county, city or town, may, by an order filed with the clerk and published as he may prescribe, direct that the court be held or con-

tinued at any other place in the city, town or county than that appointed, when war, insurrection, pestilence or any other public calamity or the danger thereof, or the destruction or danger of the building appointed for holding the court may render it necessary, and may in the same manner revoke the order, and in his discretion appoint another place in the same city, town or county for holding the court.

1887 R. S. Sec. 3870.

COURTS OF JUSTICE.

Section 3022. Parties to Appear at Place Appointed:

When the court is held at a place appointed as provided in the last Section, every person held to appear at the court must appear at the place so appointed.

1887 R. S. Sec. 3871.

Section 3023. Rooms, Etc., When Judge May Order: If suitable rooms for holding the district courts and the chambers of the judges of such courts be not provided in any county by the commissioners thereof, together with attendants, furniture, fuel, lights and stationery sufficient for the transaction of business, the court may direct the sheriff of such county to provide such rooms, attendance, furniture, fuel, lights and stationery, and the expenses thereof are a charge against such county.

1887 R. S. Sec. 3872.

COURT SEALS.

Section 3024. What Courts Have Seals: Each of the following courts has a seal:

1. The supreme court;
2. The district court;
3. The probate court.

1887 R. S. Sec. 3873.

Seals, courts and officers, judicial no-

Seals, public and private, definition and requirements of, Sec. 4403.

Section 3025. Seals, by Whom Kept: The clerk of the court must keep the seal thereof.

1887 R. S. Sec. 3874.

Section 3026. Seal, to What Proceedings Affixed: The seal of the court need not be affixed to any proceeding therein, or document except:

1. To a writ;
2. To the certificate of the probate of a will, or of the appointment of an executor, administrator or guardian;
3. To the authentication of a copy of a record or other proceeding of a court, or of an officer thereof, or a copy of a document on file in the office of the clerk.

1887 R. S. Sec. 3875.

Cited, In re Dowling (Idaho), 43 Pac. 571.

seal is void unless attested thereby.-- Choate v. Spencer, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425,

A writ issuing from a court having a

CHAPTER CXXII.

JUDICIAL OFFICERS.

Section.

JUDICIAL OFFICERS IN GENERAL.

3027. District judges may hold court in another district.

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3040. Proceedings to be in the English language.

3041. Abbreviations and figures.

3042. Means to be used to execute judicial powers in certain cases.

JUDICIAL OFFICERS IN GENERAL.

Section 3027. District Judges May Hold Courts in Another District: A district judge may hold a court in any county in this State upon the request of the judge of the district in which such court is to be held; and when by reason of sickness or absence from the State, or from any other cause a court cannot be held in any county in a district by the judge thereof, a certificate of that fact must be transmitted by the clerk to the governor, who may thereupon direct some other district judge to hold such court.

But a cause in the district court may be tried by a judge pro tempore who must be a member of the bar agreed upon by the parties litigant, or their attorneys of record, and sworn to try the cause.

1887 R. S. Sec. 3886.

Note by C. C.: The last provision of this section is added by the commission on the authority of Art. V, Sec. 12, Const. which is deemed to be self operative. The provision in relation to the governor's authority to direct a judge to hold a court in a district other than his own, as contained in the original section has not been changed as the constitutional provision in reference thereto in said Art. V, Sec. 12, is deemed simply to impose a duty upon a district judge to respond to the request of the governor and the power of the legislature to designate in what

cases and under what regulations the governor is required to make this request is not restricted by the constitution.

JUDGE ACTING IN ANOTHER COUNTY—PRESUMPTION OF REGULARITY: A judge holding court in another district must be presumed, in the absence of evidence to the contrary, to be acting upon the request of the governor, or of the judge of the court of the latter district.—In the matter of the Estate of Bernard Newman, deceased, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146.

POWERS OF JUDGES AT CHAMBERS.

Section 3028. Powers of District Judges at Chambers: District judges, at chambers, may grant all orders and writs which are usually granted in the first instance upon ex parte applications, and may, at chambers, hear and dispose of such writs and of motions for new trials, and try and determine writs of review, man-

date and prohibition, and may hear applications to discharge all such orders and writs. In case of vacancy in the office of any district judge, or his absence from the State, motions may be made before and orders granted by any other district judge.

1887 R. S. Sec. 3890.

May exercise powers expressly conferred upon judge.—Sec. 3033. Motion for new trial may be heard at chambers.—Sec. 3530. Relief from default judgment, etc., may be granted by judge at chambers.—Sec. 3241.

MOTIONS AND ORDERS: Where made and heard, Sec. 3707. When the judge is unable to hear the parties, may order transfer to some other judge, Sec. 3702.

Judge may issue and hear at chambers, writs of review, mandamus and prohibition, Sec. 3788.

Costs may be taxed by judge at chambers, Sec. 3731.

District judge, jurisdiction in summary proceedings relating to elections held by corporations, Civil Code.

Judge at chambers may make order of adjudication in insolvency, Sec. 3903.

JUDGMENT AT CHAMBERS, ENFORCING; JURISDICTION: A judge of the district court does not exceed his jurisdiction by issuing an order or writ to enforce a judgment rendered by him at chambers.—*People ex rel. Huston v. Lindsay*, 1 Idaho, 394.

ERROR OF JUDGE AT CHAMBERS, HOW CORRECTED: The district court has jurisdiction to determine the rights of several parties who claim to be entitled to the office of sheriff, and the judge of that court may properly decide in such case, whether it is necessary to allege in the complaint that there has been an actual usurpation of the office, and if there be error in the ruling, such error may be corrected on appeal.—*People ex rel. Huston v. Lindsay*, 1 Idaho, 394.

CONDEMNATION, PROCEEDINGS HEARING IN CHAMBERS: A district judge in Idaho has no jurisdiction to hear proceedings after the condemnation of lands, or to enter judgment or decree therein under the statute, at chambers.—*Washington & I. R. Co. v. Coeur d'Alene Ry. & Nav. Co.* 2 Idaho, 991, 28 Pac. 394.

ORDER PROVIDING FOR CUSTODY OF INFANT CHILD: A temporary order providing for the care and custody of an infant child may be issued by the judge of the district court at chambers.—*In re Miller* (Idaho), 43 Pac. 870.

INSOLVENCY PROCEEDINGS — ATTORNEY'S FEES: The district judge at chambers has not jurisdiction to pass upon and make an order allowing claims for attorney's fees against an insolvent estate.—*Gaffney v. Piper et al.* (Idaho), 51 Pac. 99.

FIXING ATTORNEY'S FEES: A district judge has no jurisdiction at chambers to make an order allowing or fixing the compensation of an attorney for an assignee of an insolvent debtor whose estate is being settled by proceedings in insolvency.—*In re Bank of Genesee* (Idaho), 51 Pac. 406.

WRIT OF REVIEW: Sec. 3028 gives a district judge at chambers jurisdiction to issue writ of review.—*Gans v. Steele*, judge, 61 Pac. (Idaho), 286.

POWER GENERALLY: It is a general rule that the court can transact no judicial business out of court, except where there is statutory authority to the contrary. This authority has in many instances been conferred by express provisions.—See cross references to this section. In a much larger class of cases, however, the authority must be determined by the construction of the language, employed under the rule stated in 3033, post. This section, however, is merely declaratory of the common law rule of construction and it may be stated generally that where the power is conferred upon the court and not upon the judge it cannot be exercised at chambers.

The following cases hold that the judge has not authority at chambers in particular matters: Continuance, granting, *Norwood v. Kenfield*, 34 Cal. 329; motion to strike out pleadings, *Baum v. Pacheco*, 30 Cal. 532; to set aside execution and perpetually stay its enforcement, *Baum v. Pacheco*, 30 Cal. 532; to make an order to put plaintiff in possession pending condemnation proceedings, *Loomis v. Andrews*, 49 Cal. 239.

APPEAL: The decision finally determining the rights of parties upon writs and proceedings that the court is authorized to issue or deny at chambers is usually appealable.—*Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; see also Sec. 3573, post, and annotations following.

DISQUALIFICATION OF JUDGES.

Section 3029. When Disqualified: A judge cannot act as such in any of the following cases:

1. In an action or proceeding to which he is a party, or in which he is interested;

2. When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law;

3. When he has been attorney or counsel for either party in the action or proceeding. But this Section does not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the cause to another county.

1887 R. S. Sec. 3900.

Change of place of trial, when judge disqualified, Secs. 3184 and 3185.

The grounds specified are exclusive, and bias and prejudice on the part of the judge is not ground for change of the place of trial.—*In re David Jones*, 103 Cal. 397, 37 Pac. 385, and cases cited.

Sub. 1. The provision should receive broad and liberal construction, and be extended so as to preclude the judge from sitting in any action wherein

though not directly interested in the case at bar he is directly interested in the decision of the question of fact or law involved.—*North Bloomfield G. M. Co. v. Keyser*, 58 Cal. 315; *In the Matter of the Estate of Charles M. White*, 37 Cal. 190; *Meyer v. San Diego*, 121 Cal. 102, 53 Pac. 434, 66 Am. St. Rep. 22, and note, p. 32.

Sub. 2. The word "party" construed to include all persons whose interests are represented by parties of record.—*Howell v. Budd*, 91 Cal. 342, 27 Pac. 747.

Section 3030. Not to Act as Attorney in His Own Court: A judge cannot act as attorney or counsel in a court in which he is judge, or in an action or proceeding removed therefrom to another court for trial or review, or in an action or proceeding from which an appeal may lie to his own court.

1887 R. S. Sec. 3901.

Section 3031. Certain Judges not to Act as Attorneys: A justice of the supreme court, or judge of the district court, cannot act as attorney or counsel in any court, except in an action or proceeding to which he is a party on the record.

1887 R. S. Sec. 3902.

Section 3032. No Judicial Officer to Have a Partner: No judge or other judicial officer, shall have a partner acting as attorney or counsel in any court of this State.

1887 R. S. Sec. 3903.

INCIDENTAL POWERS AND DUTIES.

Section 3033. General Powers of Judges Out of Court: A judge may exercise, out of court, all the powers expressly conferred upon a judge, as contradistinguished from the court.

1887 R. S. Sec. 3910.

Judges' powers at chambers: See 3028.

Courts can exercise judicial functions only at such times and places as are fixed by law, and judges of courts can enter no order in vacation, except such

as are expressly authorized by statute.—*De Lano et al. v. Board of Commrs of Logan Co. (Idaho)*, 35 Pac. 841.

See also *Washington & Idaho Ry. Co. v. Coeur d'Alene Ry. & Nav. Co.* 2 Idaho, 991, 28 Pac. 394.

Section 3034. Incidental Powers of Judicial Officers: Every judicial officer has power:

1. To preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of an official duty;

2. To compel obedience to his lawful orders, as provided in this Code;

3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this Code;

4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary, in the exercise of his powers and duties.

1887 R. S. Sec. 3911.

Powers of courts: Sec. 3013.

Section 3035. May Punish for Contempt: For the effectual exercise of the powers conferred by the last Section, a judicial officer may punish for contempt, in the cases provided in this Code.

1887 R. S. Sec. 3912.

Contempts in justices courts: Secs.

Proceedings for contempt generally: 3669 et seq.

Chap. CLXXVII, Secs. 3819 to 3833.

Section 3036. May Take Acknowledgment and Affidavits: The justices of the supreme court, and the judges of the district courts, have power in any part of the State, and probate judges and justices of the peace within their respective counties, to take and certify:

1. The proof and acknowledgment of a conveyance of real property or of any other written instrument ;

2. The acknowledgment of a satisfaction of a judgment of any court;

3. An affidavit or deposition to be used in this State.

1887 R. S. Sec. 3913.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

Section 3037. Subsequent Applications for Orders, When Prohibited: If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused, in whole or in part, or is granted conditionally, no subsequent application for the same order can be made to any other judge, except of a higher court; but nothing in this Section applies to motions refused for any informality in the papers or proceedings necessary to obtain the order or to motions refused, with liberty to renew the same.

1887 R. S. Sec. 3920.

Motions and orders generally: Secs. 3706 et seq.

Appealable orders: Sec. 3573.

Motion may be denied without prejudice to new application, or leave to renew may be granted.—*Ford v Doyle*, 44 Cal. 635. Leave to renew is discretionary.—*Hitchcock v. McElrath*, 69

Cal. 634, 11 Pac. 487, and will be presumed to have been properly exercised from the fact that the court permitted the second application.—*Johnston v. Brown*, 115 Cal. 694, 47 Pac. 686. The doctrine of res adjudicata is not applicable to decisions of motions pending action.—*Id.*

Section 3038. Violations of Last Section: A violation of the last Section may be punished as a contempt, and an order made contrary thereto may be revoked by the judge who made it, or vacated by a judge of the court in which the action or proceeding is pending.

1887 R. S. Sec. 3921.

Contempts: Secs. 3819 et seq.

Vacating orders: Sec. 3571.

Section 3039. No Proceedings Affected by Vacancy:

No proceeding in any court of justice in an action or special proceeding pending therein, is affected by a vacancy in the office of all or any of the judges, or by the failure of a term thereof.

1887 R. S. Sec. 3922.

Section 3040. Proceedings to be in the English Language:

Every written proceeding in a court of justice in this State shall be in the English language, and judicial proceedings shall be conducted, preserved and published in no other.

1887 R. S. Sec. 3923.

Section 3041. Abbreviations and Figures: Such abbreviations as are in common use may be used and numbers may be expressed by figures or numerals, in the customary manner.

1887 R. S. Sec. 3924.

The abbreviation "U. S." referred to are constantly used in statutes, in pleadings, and in almost all other classes of instruments, or writings, and have a known, definite and unmistakable signification. They are constantly referred to as the initial letters of the

term "United States," and are quite as frequently used as any abbreviation or initial letters in the language. It is at most merely a technical objection, which does not affect the substantial merits of the action.—*People v. Stoner et al.* 1 Idaho, 158.

Section 3042. Means to be Used to Execute Judicial Powers in Certain Cases:

When jurisdiction is, by this Code or by any other statute, conferred on a court or judicial officer all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction if the course of proceedings be not specially pointed out by this Code, or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to spirit of this Code.

1887 R. S. Sec. 3925.

ORDER FOR CUSTODY OF MINOR CHILD: Held that this section authorizes a judge at chambers to issue an order, on a petition for a writ of habeas corpus, that a child that has been forcibly taken from its mother, be returned to her, and to remain in her custody until the application for the writ of habeas corpus can be heard.—*In re Miller* (Idaho), 43 Pac. 370.

EQUITY—ACTION: An action will not lie in a court of equity to enforce a decree against a person not a party to such decree, nor will such an action lie against one who is a party to such decree when he remains within the jur-

isdiction, and is amenable to the process of the court which rendered the decree.—*Ray v. Ray*, 1 Idaho, 566.

COURT OF EQUITY: There is no power in a court of equity to confirm or enforce a void judgment, by a subsequent proceeding instituted for the purpose.—*Ray v. Ray*, 1 Idaho, 566.

This section cited *In re Downing* (Idaho), 43 Pac. 871.

This section cited *Barnes v. Buffalo Pitts Co.* (Idaho), 57 Pac. 267.

See also *Mawson v. Mawson*, 50 Cal. 542, authorizes interlocutory decrees in equity.—*Thompson v. White*, 63 Cal. 505, cases cited; *Toby v. Oregon Pac. R. R. Co.* 98 Cal. 495, 33 Pac. 550.

CHAPTER CXXIII.**JURORS.****CLASSIFICATION, DEFINITION AND REQUIREMENTS.**

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3044. Classification of juries.

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3046. Trial jury defined. Verdict by three-fourths.

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CLASSIFICATION, DEFINITIONS, AND REQUIREMENTS.

Section 3043. Jury Defined: A jury is a body of men temporarily selected from the citizens of a particular district and invested with power to present or indict a person for a public offense or to try a question of fact.

1887 R. S. Sec. 3935.

Section 3044. Classification of Juries: Juries are of three kinds:

1. Grand juries;
2. Trial juries;
3. Juries of inquest.

1887 R. S. Sec. 3936.

Section 3045. Grand Jury Defined: A grand jury is a body of men, sixteen in number, returned in pursuance of law from citizens of the county before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county.

1887 R. S. Sec. 3937.

Grand jury, court may order: Sec. 3060.

Grand juries not to be drawn except by direction of judge: Sec. 5333.

Impaneling grand jury: Sec. 3076.

Grand jury, how constituted, number, quorum of: Sec. 3077.

Section 3046. Trial Jury Defined. Verdict by Three-Fourths: A trial jury is a body of men returned from the citizens of a particular district before a court or officer of competent jurisdiction and sworn to try and determine by a verdict a question of

fact. Three-fourths of the jury may render a verdict in a civil action and such verdict shall have the same effect as a unanimous verdict.

1887 R. S. Sec. 3938 as amended.

1899 5th Ses. p. 110; 1891 1st Ses. p. 165.

CONSTITUTIONAL GUARANTY: The guaranty found in Section 7, Art. 1 of the constitution, that the right of trial by jury shall remain inviolate, was not intended to extend the right of trial

by jury, but simply to secure that right as it existed at the time of the adoption of the constitution.

Such provision does not guaranty a jury trial in equitable actions.—*Christensen v. Hollingsworth* (Idaho), 53 Pac. 211.

Section 3047. Number of Trial Jury: A trial jury consists of twelve men, *Provided*, that in civil actions or in misdemeanor cases the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court;

1887 R. S. Sec. 3939 amended to comply with Const. Art. 1, Sec. 7.

Section 3048. Jury of Inquest Defined: A jury of inquest is a body of men summoned from the citizens of a particular district, before the sheriff, coroner or other ministerial officer to inquire of particular facts.

1887 R. S. Sec. 3940.

COMPETENCY, EXEMPTIONS, AND EXCUSES.

Section 3049. Qualification of Jurors: A person is competent to act as a juror if he be:

1. A citizen of the United States and an elector of the county;
2. In possession of his natural faculties and not decrepit;
3. Possessed of sufficient knowledge of the language in which the proceedings of the courts are held.

1887 R. S. Sec. 3941.

Objections to juror for incompetency: Secs. 3461 et seq. and note.

qualifications now prescribed for an elector and a member of the so-called Mormon church cannot be a juror.—*Territory v. Evans*, 2 Idaho, 627, 23 Pac. 232.

JURY—COMPETENCY OF MORMONS: A juror must have all the

Section 3050. Persons Competent as Jurors: A person is not competent to act as a juror:

1. Who does not possess the qualifications prescribed by the preceding Section.
2. Who has been convicted of a felony or misdemeanor involving moral turpitude.

1887 R. S. Sec. 3942.

Section 3051. Exemption of Certain Persons: A person is exempt from liability to act as a juror if he be:

1. A judicial, civil or military officer of the United States or of the State of Idaho;
2. A person holding a county office;
3. An attorney and counsellor at law;
4. A minister of the gospel or a priest of any denomination;
5. A teacher in a college, academy or school;
6. A practicing physician;
7. An officer, keeper or attendant of an almshouse, hospital, asylum, or other charitable institution;

8. Engaged in the performance of duty as officer or attendant of a county jail or the state prison;

9. An express agent, mail carrier, telegraph operator, telephone agent, or keeper of a public ferry or toll gate.

10. A dispensing druggist of a prescription drug store;

11. A superintendent, engineer, conductor, fireman, or station agent of a railroad;

12. A person drawn as a juror in the district court, and who has served as such within a year; but this exemption shall not apply to a person who is summoned on a special venire, or to serve as a juror in the probate or justices' court.

1887 R. S. Sec. 3943.

Section 3052. Firemen Exempt: Twenty regularly enrolled active members of any fire department for every thousand inhabitants of the town or city where such fire department is located, are exempt from jury duty, and the chief engineer or foreman of the department must designate from the active members, and the county recorder must issue certificates of exemption for one year to the number of active members so exempt.

1887 R. S. Sec. 3944.

Section 3053. Who May be Excused: A juror cannot be excused by the court for slight or trivial cause, or for hardship, or inconvenience to his business, but only when material injury or destruction to his property, or that of the public intrusted to him is threatened, or when his own health or the sickness or death of a member of his family, requires his absence.

1887 R. S. Sec. 3945.

Section 3054. May Transmit Affidavit of Excuse: If a person exempt from liability to act as a juror, as provided in Section 3051, be summoned as a juror, he may make and transmit his affidavit to the clerk of the court for which he is summoned, stating his office, occupation or employment; and such affidavit shall be delivered by the clerk to the judge of the court when the name of such person is called, and, if sufficient in substance, it shall be received as an excuse for non-attendance in person. The affidavit shall then be filed by the clerk.

1887 R. S. Sec. 3946.

SELECTION OF LIST AND DRAWING JURY.

Section 3055. List of Persons to Serve: The board of commissioners of each county must, at their first regular meeting in each year, or at any other meeting, if neglected at the first, make a list of persons to serve as jurors in the district court of the county, for the ensuing year.

1887 R. S. Sec. 3947.

Section 3056. How Selection Made: They must proceed to select and list from the poll lists of the several precincts in their respective counties, last returned to the clerk of their board, the names

of one hundred and fifty persons competent to serve as jurors; and in making such selection, they must take the names of such only as are not exempt from serving, who are in possession of their natural faculties, and not infirm or decrepit, of fair character, of approved integrity, and of sound judgment: *Provided*, That if, in any of the counties, the county commissioners shall not be able to select the number required by this section, for jurors, they may select a less number and the highest possible.

1887 R. S. Sec. 3848.

SELECTION OF LIST—DRAWING OF JURY.

Section 3057. List to be Placed with Clerk: Certified lists of the persons selected to serve as jurors must at once be placed in the possession of the clerk of the district court.

1887 R. S. Sec. 3949.

Section 3058. Duty of Clerk on Receiving List: On receiving such lists, the clerk must file the same in his office, and write down the names contained therein on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon, and deposit them in a box to be called the "jury box."

1887 R. S. Sec. 3950.

Section 3059. Regular Jurors to Serve One Year: The persons whose names are so returned are known as regular jurors, and must serve for one year, and until other persons are selected and returned.

1887 R. S. Sec. 3951.

Section 3060. Order for Drawing Jury: The district court, or the judge thereof, if a trial jury will be required at any term of the district court, must make and file with the clerk an order that one be drawn. The number to be drawn must be fixed in the order; if to form a grand jury, it must be twenty, and if a trial jury, such number as the judge may direct.

1887 R. S. Sec. 3952, as amended, 1899 5th Ses. p. 335, Const. Art. 1, Sec. 8.

Impaneling the grand jury—when, power of the court: Sec. 3076 and note.

This section examined and its provisions constructed; held not to conflict with section 3069.—In re Corcoran (Idaho), 59 Pac. 18.

Section 3061. Clerk to Notify Judge and Sheriff of Drawing: At least one day before the drawing, the clerk must notify the sheriff and probate judge of the time when such drawing will take place, which time must not be more than three days after the receipt by him of the order for such drawing.

1887 R. S. Sec. 3953.

Section 3062. Sheriff and Judge to Witness Drawing: At the time so appointed, the sheriff, in person or by deputy, and the probate judge, must attend at the clerk's office to witness such drawing, and if they do so, the clerk must, in their presence, proceed to draw the jurors.

1887 R. S. Sec. 3954.

Section 3063. Drawing When to be Adjourned: If the officers so notified do not appear, the clerk must adjourn the drawing until the next day, and, by written notice, require two electors of the county to attend such drawing on the adjourned day.

1887 R. S. Sec. 3955.

Section 3064. Shall Proceed, When: If, at the adjourned day, the sheriff, probate judge, and electors, or any two of such persons, appear, the clerk must in their presence proceed to draw the jurors.

1887 R. S. Sec. 3956.

Section 3065. Drawing How Conducted: The clerk must conduct such drawing as follows:

1. He must shake the box containing the names of jurors returned to him, from which jurors are required to be drawn, so as to mix the slips of paper upon which such names were written, as much as possible;

2. He must then publicly draw out of the box as many such slips of paper as are ordered by the judge;

3. A minute of the drawing must be kept by one of the attending officers, in which must be entered the names contained on every slip of paper so drawn, before any other slip is drawn;

4. If after drawing the whole number required, the name of any person has been drawn who is dead or insane, or who has permanently removed from the county, to the knowledge of the clerk or any other attending officer, an entry of such fact must be made in the minutes of the drawing, and the slip of paper containing such name must be destroyed;

5. Another name must then be drawn, in place of that contained on the slip of paper so destroyed, which must in like manner, be entered in the minutes of the drawing;

6. The same proceeding must be had as often as may be necessary, until the whole number of jurors required are drawn;

7. The minutes of the drawing must then be signed by the clerk and the attending officers or persons, and filed in the clerk's office;

8. Separate lists of the names of the persons so drawn for trial jurors, and of those drawn for grand jurors, specifying for what court they were drawn, must be made and certified by the clerk and the attending officers or persons, and delivered to the sheriff of the county;

9. If both a grand and petit jury are ordered at the same drawing, the grand jury shall be drawn first.

1887 R. S. Sec. 3957.

Clerk's certificate: See *People v. Iams*, 57 Cal. 115.

Section 3066. Disposition of Ballots After Adjournment: After the adjournment of any court at which jurors have been returned as herein provided, the clerk must inclose the ballots containing the names of those who attended and served as jurors in an envelope, under seal, and the ballots of those who did not attend

and serve must be returned to the jury box. The ballots sealed in envelopes must not be returned to the jury box.

1887 R. S. Sec. 3958.

Section 3067. Copy of List to be Furnished by Clerk: The clerk of the district court must furnish any person applying therefor and paying the fees allowed by law for the same, a copy of the list of jurors drawn to attend any court.

1887 R. S. Sec. 3959.

SUMMONING.

Section 3068. Sheriff to Summon Jurors, How: As soon as he receives the list of jurors drawn, the sheriff must summon the persons named therein to attend by giving personal notice to each, or by leaving a written notice at his place of residence, with some person of proper age, and must return the list to the court at the time fixed in the order for their appearance, specifying the names of those who are summoned and the manner in which each person was notified. The grand jurors shall be summoned to appear on the first day of the term, at the hour of eleven o'clock in the forenoon, and the trial jurors on such day of the term, and at such hour as the presiding judge of the court may by order direct.

1887 R. S. Sec. 3960.

Section 3069. Court May Order Jury Drawn, When: Whenever jurors are not drawn and summoned to attend any court of record, or a sufficient number of jurors fail to appear, such court may, in its discretion, order a sufficient number to be drawn and summoned to attend such court; or it may, by an order entered on its minutes, direct the sheriff of the county to summon so many good and lawful men of his county to serve as jurors as the case may require. And in either case such jurors must be summoned in the manner provided by the preceding section.

1887 R. S. Sec. 3961.

MUST FIRST EXHAUST REGULAR PANEL: It is error for the court to draw a jury until the regular panel is exhausted, and that fact must appear affirmatively from the record.—*People v. Dunn*, 1 Idaho, 74.

MAY DISCHARGE REGULAR PANEL FOR GOOD CAUSE: Under provisions of Section 3961, Rev. St., the court may, for good cause, discharge

regularly drawn and summoned jurors, and order open venire for jurors to try causes at the term for which jurors were regularly drawn.—*Simmons v. Cunningham et al.* (Idaho), 39 Pac. 1109.

DRAWING AND SUMMONING: Record examined and held to comply with this section in regard to ordering, drawing, and summoning the jury.—*In re Corcoran* (Idaho), 59 Pac. 18.

Section 3070. Completed from Body of County or from Bystanders: When there are not competent jurors enough present to form a panel, the court may direct the sheriff or other proper officer to summon a sufficient number of persons having the qualifications of jurors, to complete the panel from the body of the county or from the bystanders, and the sheriff must summon the number so ordered, accordingly, and return the names to the court. The jurors summoned under this or the preceding section, may be required to appear forthwith or at a time to be named in the order,

as the court may direct, and the officer summoning such jurors shall return the order as hereinbefore provided.

1887 R. S. Sec. 3962.

Section 3071. For Probate and Justices Court, by Whom Summoned: When jurors are required in any probate or justice's court, they must, upon the order of the judge or justice thereof, be summoned by the sheriff, marshal or constable of the jurisdiction.

1887 R. S. Sec. 3963.

Section 3072. How Summoned: Such jurors must be summoned from the persons resident of the city or precinct competent to serve as jurors, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

1887 R. S. Sec. 3964.

Section 3073. Officer's Return: The officer summoning such jurors must, at the time fixed in the order for their appearance, return the venire with a list of the persons summoned indorsed thereon.

1887 R. S. Sec. 3965.

Section 3074. Juries of Inquest, How Summoned: Juries of inquest must be summoned by the officer before whom the proceedings are had, or any sheriff or constable, from the persons resident of the county competent to serve as jurors, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

1887 R. S. Sec. 3966.

Section 3075. Obedience to Summons, How Enforced: Any juror summoned who wilfully and without reasonable excuse, fails to attend, may be attached and compelled to attend, and the court may also impose a fine not exceeding one hundred dollars, upon which execution may issue. If the juror was not personally served, the fine must not be imposed until, upon an order to show cause, an opportunity has been offered the juror to be heard.

1887 R. S. Sec. 3967.

PROCEEDINGS UPON RETURN OF JURY.

Section 3076. Grand Jury, When to be Empaneled: At the opening of any term of the district court for which a grand jury has been ordered and summoned, unless otherwise directed by the court, and as often thereafter as to the court may seem proper, a grand jury may be empaneled.

1887 R. S. Sec. 3968, as modified by, Const. Art. 1, Sec. 8.

This section and also section 3060 ante, have been amended by the Commission, on the authority of the Const. Art. 1, Sec. 8. The first proviso of said section, "that a grand jury may be summoned by the district court in the

manner provided by law" vests the power in the district court to determine when the public interests require the summoning of a grand jury. The legislature may provide the manner of summoning the jury, but cannot restrict or enlarge the power of the court to determine the necessity. Under the rule

of construction that when powers are granted to a court they cannot usually be exercised by the judge out of court, it is assumed that the judge at chambers could not have the power to determine upon the necessity for a grand jury. The purpose of said Sec. 8, of Art. 1, Const. seems to have been to introduce the system of presentment by information and while the grand jury system is not abolished it was undoubtedly the intention of the constitution that it should not be ordinarily em-

ployed and that the people be saved the expense and inconvenience of a system that had its birth under conditions that have long since ceased to exist, and that a grand jury should only be called when the ordinary methods of prosecuting crime by examination before a magistrate and upon information by a public prosecutor, should under peculiar and extraordinary circumstances, be deemed by the court to be ineffectual and inadequate.

Section 3077. Grand Jury, How Constituted: Sixteen persons shall constitute a grand jury, twelve of whom shall constitute a quorum, and when of the jurors summoned, no more nor less than sixteen attend they shall constitute the grand jury. If more than sixteen attend the clerk must call over the list summoned, and the sixteen first answering shall constitute the grand jury. If less than sixteen attend, the panel may be filled to sixteen as provided in section 3069.

1887 R. S. Sec. 3969.

Section 3078. How Empaneled: Thereafter such proceedings shall be had in empaneling the grand jury as are prescribed by the criminal practice.

1887 R. S. Sec. 3970.

Section 3079. Names of Trial Jurors, How Kept At the time when the order for the trial jurors was made returnable, or as soon thereafter as convenient, the clerk, under the direction of the court must call the names of those summoned, and the court may then hear the excuses of jurors summoned.

The clerk must then write the names of jurors present, and not excused, upon separate slips or ballots of paper, and fold such slips so the names are concealed, and then in the presence of the court, deposit the slips or ballots in a box, which must be kept sealed until ordered by the court to be opened.

1887 R. S. Sec. 3971.

Section 3080. To be Empaneled as Prescribed in this Code: When thereafter an action is called for trial by the jury, such proceedings shall be had in empaneling the trial jury as are prescribed in this Code.

1887 R. S. Sec. 3972.

For provisions concerning impaneling, challenges, and generally of trial

before jury in district court: Chap. CXLV, Secs. 3459 to 3481.

Section 3081. Proceedings in Forming Jury in Courts not of Record: At the time appointed for a jury trial, in probate or justices' courts, the list of jurors summoned shall be called. If a sufficient number of jurors are in attendance, the probate judge or justice may proceed to empanel the jury. When there are not competent jurors enough present to form a panel the judge or justice may direct the proper officer to summon a sufficient number

of persons, having the qualifications of jurors to complete the panel and such officer must summon the number so ordered, accordingly and return the same into court forthwith or at such time as may be designated in the order.

1887 R. S. Sec. 3973.

Section 3082. In Criminal Cases: Thereafter, if the action is a criminal one, the jury must be empaneled as provided by the statutes relating thereto. If a civil one as provided by this Code.

1887 R. S. Sec. 3974.

Section 3083. Mode and Manner of Empaneling Inquest Juries: The mode and manner of empaneling juries of inquest are provided for in the provisions of the different statutes relating to such inquests.

1887 R. S. Sec. 3975.

FEES.

Section 3084. Fees of Jurors in District Courts: The pay of grand and petit jurors in the district court, is three dollars per day for each day of actual attendance at court, and fifteen cents per mile for each mile necessarily traveled in going to and returning from court, which must be paid out of the county treasury.

1887 R. S. Sec. 6136.

Section 3085. Clerk to Pay Juror, How: At the end of each term of a district court the clerk must make out a certificate to each juror entitled thereto, certifying the number of days such juror has attended court, and the amount remaining due to him for per diem and mileage. Each juror must state on oath to the clerk the number of miles traveled for which he is entitled to pay; but no juror must receive mileage for going to, or returning from court more than once during the same term; and no person summoned as a juror and excused at his own request, must receive any per diem or mileage.

1887 R. S. Sec. 6137.

Section 3086. Fees of Jurors in Justice and Probate Courts: Jurors in civil and criminal cases in the probate and justices courts are entitled to receive two dollars per day for each day actually engaged in the trial of a case. And twenty-five cents per mile, one way. Such mileage and per diem in all civil cases must be entered and taxed up as costs against the losing party, and in all criminal cases, must be paid out of the county treasury of the county where such probate or justice court is held, upon the certificate of the probate judge or justice before whom such case was tried, to be audited and paid as other claims against the county.

1899 5th Ses. p. 180; 1891 2nd Ses. p. 65.

Under the statutes of this state a court is not authorized to require a liti-

gant to deposit jurors' fees, as a condition precedent to the right to a trial by jury. *Randall v. Kelsey et al.* (Idaho,) 61 Pac. 515.

CHAPTER CXXIV.

ATTORNEYS AND COUNSELORS AT LAW.

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QUALIFICATIONS AND ADMISSION.

Section 3087. Who may be Admitted: Any citizen or person, resident of this state, who has bona fide declared his intention to become a citizen in the manner required by law; of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning, and ability, is entitled to admission as attorney and counselor in all courts of this state.

1899 5th Ses. p. 302; 1897 4th Ses. p. 53.

Note by C. C.: This section is identical with 1887 R. S. Sec. 3990, except that words "white male" are omitted.

An attorney does not hold on office or public trust in the constitutional sense of the term.—Ex parte Gregory Yale, 24 Cal. 241, 85 Am. Dec. 62.

Section 3088. Qualifications of Attorney: Every applicant for admission as an attorney and counselor must produce satisfactory testimonials of good moral character, and, except as hereinafter provided, undergo a strict examination in open court as to his qualifications, by the justices of the supreme court: *Provided*, That the several district courts of this state may admit applicants to practice as attorneys and counselors in their respective courts upon like testimonials and examination.

1887 R. S. Sec. 3991.

Section 3089. Certificate of Admission, License: If, upon such examination in the supreme court, the applicant is found qualified, the court shall admit him as attorney and counselor in all the courts of this state, and shall direct an order to be entered to that effect upon its records, and that a certificate of such record be given to him by the clerk of the court, which certificate is his license.

1887 R. S. Sec. 3992.

Section 3090. Oath and Admission Fee: Every person, before receiving license to practice law, shall take the oath prescribed by law, and shall pay to the state treasurer the sum of twenty-five dollars for the use of the state library fund, and the clerk of the

court shall require of the person so admitted the receipt of the said treasurer, before issuing such license, and in no case shall the oath be administered or the license issued until such receipt is produced and filed in the office of the clerk.

1887 R. S. Sec. 3993.

Section 3091. Attorney of Other States and Territories: The examination may be dispensed with in the case of a person who has been admitted attorney and counselor, and is still in good standing as such, in the highest court of any other state or territory, and his affidavit of such admission and standing, showing the county, state or territory, the name of the court, and the time when such admission was obtained, or his license showing the same, shall be deemed sufficient to entitle him to admission, with affidavit of such standing.

1887 R. S. Sec. 3994.

Section 3092. Roll of Attorneys: Each clerk must keep a roll of attorneys and counselors admitted to practice by the court of which he is clerk, which roll must be signed by the person admitted before he receives a license.

1887 R. S. Sec. 3995.

Section 3093. Penalty for Practicing without License: If any person shall practice law in any court, except a justice's court, without having received a license as attorney and counselor, he is guilty of a contempt of court.

1887 R. S. Sec. 3996.

DUTIES, AUTHORITY, COMPENSATION, SUBSTITUTION.

Section 3094. General Duties: It is the duty of an attorney and counselor:

1. To support the constitution and laws of the United States and of this state;
2. To maintain the respect due to the courts of justice and judicial officers;
3. To counsel or maintain such actions, proceedings, or defenses only as appear to him legal or just, except the defense of a person charged with a public offense;
4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judges by an artifice or false statement of fact or law;
5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his clients;
6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;
7. Not to encourage either the commencement or the continuance of an action or proceeding from any motive of passion or interest;
8. Never to reject for any consideration personal to himself the cause of the defenseless or the oppressed.

1887 R. S. Sec. 3997.

Sub. 5. Attorneys cannot disclose confidential communications as witnesses: Sec. 4406, sub. 2.

ATTORNEYS AS WITNESSES: Attorneys should offer themselves as witness for their clients only in case of supreme necessity.—*Sebree v. Smith*, 2 Idaho, 329, 16 Pac. 915.

SURREPTITIOUS NEGOTIATIONS: The following quotation is made from the body of the decision by C. J. Sullivan at page 921 of the case cited: "But we are loth to believe that any attorney of this bar would enter into surreptitious relations or dealings with clients of opposing counsel for a compromise, settlement, or management of the case. Chief Justice Sanderson, in the case of *Commissioner v. Younger*, 29 Cal. 150, has very clearly expressed the mind of this court upon such dealings, in the following language: 'It is proper to add that to entirely ignore the attorney of record, and enter, without consent, into secret negotiations with his client, touching the

management of his case, is unbecoming destructive to the legal profession, and destructive to the courtesy which is due from one member to another.'"—*Pence v. Sweeney*, 2 Idaho, 921, 28 Pac. 413.

Sub. 5. **PRIVILEGED COMMUNICATIONS:** Communications where attorney was acting for both parties to a negotiation or where made in presence of all parties to the controversy, not privileged.—*Murphy v. Waterhouse*, 113 Cal. 467, 54 Am. St. Rep. 365, 45 Pac. 866.

CONTEMPT — BRIEFS, LANGUAGE IN: Abuse of judge of the trial court in a brief filed in the appellate court will be treated as a contempt of the latter court.—*Sears v. Starbird*, 75 Cal. 91, 16 Pac. 531, 7 Am. St. Rep. 123. And where unwarranted language is used assailing a justice of the supreme court the attorney should be suspended.—*In re Philbrook*, 105 Cal. 471, 38 Pac. 511 and 884, 45 Am. St. Rep. 59, and note.

Section 3095. Authority of Attorney: An attorney and counselor has authority:

1. To bind his client in any of the steps of an action or proceeding, by his agreement filed with the clerk, or entered upon the minutes of the court and not otherwise;

2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

1887 R. S. Sec. 3998.

Satisfaction of judgment may enter and acknowledge unless revocation of authority filed: Sec. 3514.

AUTHORITY OF ATTORNEY: An attorney is a sworn officer of the court and within his sphere is as independent as the judge of the court. He has rights and powers entirely different from and superior to an ordinary agent.—*Curtis et al. v. Richards*, Judge (Idaho), 40 Pac. 57.

EMPLOYMENT EXPIRED: Where an attorney serves notice upon attorney for adverse party that he would appear no futher in the case and that his employment had expired, service thereafter upon him will not bind the client.—*Bonner v. Powell* (Idaho), 61 Pac. 138.

STIPULATIONS OF ATTORNEYS
—WRITTEN STIPULATIONS REQUIRED: The court will not attempt to determine the nature or effect of oral stipulations of litigant or attorneys affecting the rights of parties on the con-

duct of the trial and it will not enforce such stipulations unless the attorneys agree in open court as to what they are, nor will they be considered on appeal unless they are a part of the record.—*Sebree v. Smith*, 2 Idaho, 329, 16 Pac. 915.

STIPULATION IN VIOLATION OF RULES OF COURT: A stipulation of parties in disregard of the rules of the court will not be regarded by the court.—*First Nat. Bank of Moscow v. Martin* (Idaho), 55 Pac. 302.

STIPULATION — CONTENTS OF LEGISLATIVE JOURNAL: It is not comptent for attorneys in an action raising the constitutionality of the enactment of a statute to stipulate as to the contents of the legislative journal.—*State v. Boise* (Idaho), 51 Pac. 110.

READING EXCEPTIONS: When parties, by stipulation, agree that either party have "60 days after the rendition of the decision" in which to prepare and serve bill of exceptions, such stipulation is a waiver by both

parties of notice of entry of the judgment, unless the time therefor be properly extended.—*Lydon v. Piper* (Idaho), 51 Pac. 101.

REPLEVIN—STIPULATIONS AS TO DAMAGES: In an action of claim and delivery it was stipulated by the parties, through their representative attorneys, that if plaintiff was entitled to recover at all, he was entitled to recover the full value of the property or nothing. The jury found for the plaintiff in the sum of \$2500, the amount stipulated. The record showing that the plaintiff was clearly entitled to recover, held, that a verdict and judgment for \$2500 would not be disturbed.—*Mahorney v. Marshall*, 2 Idaho, 1174, 31 Pac. 809.

STIPULATION OF JUDGMENT: Where defendant stipulates in writing that an item of the complaint be increased and that the whole judgment be enlarged to include this increase, such stipulation warrants judgment for the enlarged amount.—*Grete v. Knott*, 2 Idaho, 18, 3 Pac. 25.

MODIFICATION OF JUDGMENT: A judgment will be modified and affirmed pursuant to a stipulation by the parties for a correction of errors assigned to certain portions thereof.

The costs of an appeal will be awarded to the appellant, where stipulations for the correction of errors upon which the judgment appealed from is modified were made after the appeal was taken.—*Kelly v. Leachman* (Idaho), 39 Pac. 1113.

JUDGMENT CONTRAVENING USURY LAWS: Plaintiff brought action upon a usurious contract. Judgment was

entered upon stipulations of parties in favor of plaintiff, from which defendant appealed. Held, that the judgment so entered, being a contravention of the usury laws of the state, the same was erroneous.—*Ocobock v. Nixon et al.* (Idaho), 57 Pac. 309.

POWER TO COMPROMISE: There is no implied power or ostensible authority to compromise.—*Preston v. Hill*, 50 Cal. 43, 19 Am. Rep. 647.

STIPULATIONS: May stipulate facts and the stipulation stands in place of findings as part of judgment roll.—*Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

A stipulation that a statement contained in a record is a correct statement on motion for a new trial waives all technical objections to the transcript and it will be presumed that notice of motion was given though none appear in the record.—*Godchaux v. Mulford*, 26 Cal. 316, 85 Am. Dec. 178.

DEATH OF PARTY—AUTHORITY OF ATTORNEY: The authority of an attorney terminates on the death of the party employing him and service of notice of appeal on him thereafter will not bind the representatives of the deceased, but where death of respondent was unknown to appellant and administrator retained the same attorney and conspired with him to fraudulently keep back the knowledge of such decease until the time had elapsed within which another appeal might be taken, the administrator will be stopped from attacking the notice.—*Moyle v. Landers*, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241.

Section 3096. Compensation of Attorneys: The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties.

1887 R. S. Sec. 4900, portion of
CONTRACT CONTRAVENING LAW OF UNITED STATES: The act of congress of March 3, 1891, providing for the allowance of compensation to attorneys for services in prosecuting claims for Indian depredations, is conclusive of the whole question of attorneys' compensation in such cases; and, where the amount of attorneys' compensation has been settled and allowed by the court of claims, no other or further compensation can be collected, any contract to the contrary notwithstanding.—*Mullan v. Clark* (Idaho), 38 Pac. 247.

USURIOUS CONTRACT—MORTGAGE FORECLOSURE: In a suit upon a usurious contract, it is error to allow the plaintiff, under the stipulations of a mortgage securing the debt,

an attorney fee, as such fee is no part of the debt.—*Fidelity Sav. Ass'n. v. Shea* (Idaho), 55 Pac. 1022.

STIPULATION FOR ATTORNEY'S FEES: A stipulation in a mortgage for an allowance for an attorney fee in case of foreclosure is valid, but should be enforced only for a reasonable amount. In determining what amount is reasonable, the court should allow no more than is actually received or collected for his services.—*Broadbent v. Brumback*, 2 Idaho, 336, 16 Pac. 555.

ATTORNEY'S FEES—INSOLVENCY PROCEEDINGS: Costs incurred by the assignee of an insolvent estate, in proceedings in insolvency, for reasonable and necessary attorney's fees incurred in protecting the insolvent estate, should be allowed to the assignee, on his application, and not

to the attorney.

Orders allowing attorney's fees for services rendered the assignee of an insolvent debtor, which are made on ex parte application of the attorney, by the district judge, either in open court or at chambers, are in violation of the rights of the creditors, and unauthorized.

A district judge has no jurisdiction at chambers to make an order allowing or fixing the compensation of an attorney for an assignee of an insolvent debtor whose estate is being settled by proceedings in insolvency.—*In re Bank of Genesee*, *Gaffney v. Denning* (Idaho) 51 Pac. 406.

ATTORNEY AND CLIENT, GENERALLY: The cases following relate to the general subject of contractual relations between attorney and client.

An attorney who bargains in a matter of advantage to himself with his client, is bound to show that the transaction is fair and equitable.—*Kisling et al. v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644.

The employment of a firm of attorneys is so far for the personal service of all, that the client may elect to consider the employment terminated on the death of one member, but if he do not do so the survivor is bound to complete the unfinished contracts.—*Little v. Caldwell*, 101 Cal. 553, 36 Pac. 107, 40 Am. St. Rep. 89.

A contract between an attorney and a third person that he will procure the attorney's employment by a litigant and that in consideration of such procurement the attorney will divide with him any fees that may be received is void as against public policy.—*Alpers v. Hunt*, 86 Cal. 78, 24 Pac. 846, 21 Am. St. Rep. 17.

An attorney discharged from a case without cause may recover the amount to which he would have been entitled had the defendant allowed him to complete the entire service which he contracted to perform, with interest from the time it became due.—*Bartlett v. Odd Fellows' Saving Bank*, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139.

AUTHORITY OF GUARDIANS, ADMINISTRATORS, CORPORATION OFFICERS AND PARTENERS: Guardian ad litem appointed by the court has no power to fix compensation of attorney employed by him, and an order of the court fixing compensation and requiring balance of money paid to be paid into court, held valid.—*Cole v. Superior Court*, 63 Cal. 86, 49 Am. Rep. 78.

Attorney for an administrator may act for one of the heirs against other heirs, in cases where no disqualifying relations, such as interest of adminis-

trator as heir in the estate, exists.—*Jones v. Lamont*, 118 Cal. 449, 50 Pac. 766, 62 Am. St. Rep. 251.

Provision in a will directing executor to employ a certain attorney in all matters pertaining to the will is simply advisory and may be disregarded by the executor and other attorneys employed.—*In the matter of the estate of Anna Ogir, Deceased*, 101, Cal. 381, 35 Pac. 900, 40 Am. St. Rep. 61.

Retiring partner of a firm must give notice of his retirement, or he will be liable to attorney of the firm on contracts made by them after his retirement.—*Williams v. Bowers et al.* 15 Cal. 321, 76 Am. Dec. 489.

The president of a corporation is presumed to be authorized to employ an attorney and the open and notorious exercise of the power to enter into this contract must be regarded as presupposing an authority, in some form accredited by law, to the president of the company for that purpose.—*Pixley v. W. P. R. R. Co.* 33 Cal. 183, 91 Am. Dec. 623.

ATTORNEY'S LIABILITY FOR NEGLIGENCE: Where attorney has been guilty of no fraud or collusion, nor any malicious or tortious act, he is liable only to the client employing him for any injury arising from mere negligence, and not to third party with whom he had no privity of contract.—*Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 52 Am. St. Rep. 88.

Same, pleading, allegations necessary in complaint.—3 Cal. 108, 58 Am. Dec. 388.

Payment of retaining fee must be averred.—*Id.*

Attorney cannot change sides on subsequent trial, even though client has failed to pay for his services.—*Weidenkind v. Water Company*, 74 Cal. 386, 19 Pac. 173, 5 Am. St. Rep. 445.

Where an attorney is retained to examine abstract of title, the relation of attorney and client exists although the services were to be paid for by another.—*Wittenbrock v. Parker*, 102 Cal. 92, 36 Pac. 374, 41 Am. St. Rep. 172.

ATTORNEY FEES GENERALLY: Right to recover by stipulation in bill of exchange, etc., against adverse party.—*Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461.

Dissolution, law partnership, fees, unfinished business.—*Osment v. McElraith*, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17.

LIEN OF ATTORNEY FOR DISBURSEMENTS: A judgment of the trial court, entered in accordance with the mandate of the supreme court for costs and disbursements of plaintiff's attorneys, because of their client's in-

solvency, is impressed with a lien in favor of such attorneys, paramount to all claims, and such lien can be discharged or the judgment satisfied only by payment to such attorneys, and cannot be set off against other judgments against their client.—*Victor Gold and Silver Mining Company v. National Bank*, 18 Utah, 87, 72 Am. St. Rep. 767, 55 Pac. 72.

Section 3097. Change of Attorney: The attorney in an action or special proceeding may be changed at any time before judgment or final determination as follows:

1. Upon his own consent, filed with the clerk, or entered upon the minutes;
2. Upon the order of the court or judge thereof, upon the application of the client, after notice to the attorney.

1887 R. S. Sec. 3999.

PAYMENT OF FEES REQUIRED:

A party has no right arbitrarily to change his attorney without paying or securing fees earned.—*Curtis et al. v. Richards*, Judge (Idaho), 40 Pac. 57.

APPEAL — SUBSTITUTION OF ATTORNEYS: A motion to change attorneys in a suit pending in a special proceeding, and a judgment rendered on such motion is a final judgment, from which appeal to this court may be taken.—*Curtis v. Richards* (Idaho), 40 Pac. 57.

CHANGE OF OFFICERS OF BANKS — SUBSTITUTION OF AT-

LIABILITY TO THIRD PERSONS — LIBEL: Communications from an attorney to his client are absolutely privileged and no action for libel can be maintained against the attorney thereon.—*Hollis v. Meux*, 69 Cal. 625, 11 Pac. 248, 58 Am. Rep. 574.

TORNEY: The attorney appointed by new directors entitled to substitution in matters pending.—*People's Bank v. Superior Court*, 104 Cal. 649, 43 Am. St. Rep. 147, 38 Pac. 452.

ATTORNEY OF RECORD—RIGHT TO CONTROL THE ACTION: Right to manage and control cannot be questioned by opposite party, nor can a party appearing by attorney assume control of his own case nor stipulate that the action be dismissed unless the attorney of record consents.—*Commissioners, etc., v. Younger*, 29 Cal. 147, 31 Am. Dec. 164; see also extended note following.—Id.

Section 3098. Notice of Change: When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party; until then, he must recognize the former attorney.

1887 R. S. Sec. 4000.

Section 3099. Death or Removal of Attorney: When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

1887 R. S. Sec. 4001.

REMOVAL OR SUSPENSION.

Section 3100. Causes for Removal or Suspension: An attorney and counselor may be removed or suspended by the supreme court and by the district courts for either of the following causes, arising after his admission to practice: 1. His conviction of a felony or misdemeanor involving moral turpitude in which case the record of conviction is conclusive evidence. 2. Wilful disobedience or violation of an order of the court, requiring him to do

or forbear, an act connected with or in course of his profession and any violation of the oath taken by him or his duties as such attorney and counselor. 3. Corruptly and without authority appearing as attorney for a party to an action or proceeding. 4. Lending his name to be used as an attorney and counselor by any other person who is not an attorney and counselor. 5. Failure for ten days after written demand, and payment or tender of the fees and expenses due him from his client to pay over or deliver any money or other property belonging to his client which he shall have received in his office of attorney or counselor in the course of collection or settlement of any claim or demand. 6. Habitual intemperance to such an extent that it disqualifies such attorney from faithfully discharging the duties devolving upon him. And in all cases where an attorney is removed or suspended by a district court, the judgment or order of removal or suspension may be reviewed on appeal by the supreme court.

1899, 5th Ses. p. 302; 1897, 4th Ses. p. 55, amending Laws 1887 R. S. Sec. 4002.

REMOVAL WHEN CRIME IS CHARGED: When an attorney is charged with a crime indictable under the statutes, in disbarment proceedings, the court will not proceed therein until proceedings have been taken in the district court, or until sufficient time has elapsed to afford the proper authorities opportunity to prosecute the accused in that court.—In re Tipton (Idaho), 42 Pac. 504 (see cases cited.)

But where the charge was the use of false and fraudulent affidavits in proceedings before the court, the court did not require that recourse first be had to the criminal court.—In re Wharton, 114 Cal. 367, 46 Pac. 172, 55 Am. St. Rep. 72.

SUSPENSION PENDING INVESTIGATION DISAPPROVED: In an application for the disbarment of an attorney it is not proper for the court ordinarily to deprive the accused of his rights as an attorney pending the investigation and trial of the cause.—State ex rel. McNamee v. Goode (Idaho), 44 Pac. 640.

GROUND FOR DISBARMENT. False and fraudulent affidavits, used in court proceedings.—In re Wharton, 114 Cal. 367, 46 Pac. 172, 55 Am. St. Rep. 72. Unprofessional conduct, accepting retainer against former client.—In re Cowdery, 69 Cal. 32, 10 Pac. 47, 58 Am. St. Rep. 545.

CONTEMPT: Abusive language in brief applied to justice of the supreme court.—In re Philbrook, 105 Cal. 471, 38 Pac. 511 and 884, 45 Am. St. Rep. 59.

Section 3101. Conviction of Felony, Moral Turpitude: In case of the conviction of an attorney or counselor of a felony, or misdemeanor involving moral turpitude, the clerk of the court in which a conviction is had, must, within thirty days thereafter, transmit to the supreme court a certified copy of the record of conviction.

1887 R. S. Sec. 4003.

Section 3102. Proceedings for Removal or Suspension: The proceedings to remove or suspend an attorney and counselor under the first sub-division of section 3100, must be taken by the court on receipt of a certified copy of the record of conviction. The proceedings under the second sub-division of section 3100, may be taken by the court for matters within its knowledge, or may be taken upon the information of another.

1887 R. S. Sec. 4004.

Section 3103. Accusation: If the proceedings are upon the information of another, the accusation must be in writing, stat-

ing the matters charged and be verified by the oath of some person to the effect that the charges therein contained are true.

1887 R. S. Sec. 4005 and 4006.

Section 3104. Citation to Answer: After receiving the accusation the court must, if in its opinion the case requires it, make an order requiring the accused to appear and answer the accusation at a specified time in the same or subsequent term, and must cause a copy of the order and of the accusation to be served upon the accused within a prescribed time before the day appointed in the order.

1887 R. S. Sec. 4007.

Proceedings without notice and opportunity to answer are invalid; and where attorney's name has been

stricken from the roll, mandamus will issue to compel reinstatement.—*People v. Turner*, 1 Cal. 143, 52 Am. Dec. 295.

Section 3105. Appearance: The accused must appear at the time appointed in the order and answer the accusation, unless for sufficient cause the court assign another day for that purpose; if he does not appear, the court may proceed and determine the accusation in his absence.

1887 R. S. Sec. 4008.

Section 3106. Plea to Accusation: The accused may answer to the accusation either by objecting to its sufficiency or denying it.

1887 R. S. Sec. 4009.

Section 3107. Demurrer: If he object to the sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds for the objection. If he deny the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

1887 R. S. Sec. 4010.

Section 3108. Answer: If an objection to the sufficiency of the accusation be not sustained, the accused must answer within such time as may be designated by the court.

1887 R. S. Sec. 4011.

Section 3109. Trial: If the accused plead guilty, or refuse to answer the accusation, the court must proceed to judgment of removal or suspension. If he deny the matters charged, the court must, at such time as it may appoint, proceed to try the accusation.

1887 R. S. Sec. 4012.

Section 3110. Reference: The court may, in its discretion, order a reference to a committee to take depositions in the matter.

1887 R. S. Sec. 4013.

Section 3111. Judgment: Upon conviction, in cases arising under the first sub-division of section 3100, the judgment of the court must be that the name of the party must be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state, and upon conviction in cases under the other sub-

divisions of that section, the judgment of the court may be according to the gravity of the offense charged—deprivation of the right to practice as an attorney or counselor in the courts of this state, permanently, or for a limited period.

1887 R. S. Sec. 4014.

Under this section the supreme court has jurisdiction in a proceeding for the disbarment of an attorney, to render a judgment, suspending him from prac-

tice for a definite period or until the performance by him of a certain condition.—*In re Tyler*, 78 Cal. 307, 20 Pac. 674, 12 Am. St. Rep. 55.

TITLE XVI.

CIVIL PROCEDURE IN DISTRICT COURT.

- Chap. CXXV. Form of Civil Actions.
- Chap. CXXVI. Time of Commencing Actions.
- Chap. CXXVII. Parties to Civil Actions.
- Chap. CXXVIII. Place of Trial of Civil Actions.
- Chap. CXXIX. Manner of Commencing Civil Actions.
- Chap. CXXX. Pleadings in Civil Actions.
- Chap. CXXXI. Arrest and Bail.
- Chap. CXXXII. Claim and Delivery of Personal Property.
- Chap. CXXXIII. Injunctions.
- Chap. CXXXIV. Attachments.
- Chap. CXXXV. Receivers.
- Chap. CXXXVI. Deposit in Court.
- Chap. CXXXVII. Divorces in Cases of Insanity.
- Chap. CXXXVIII. Actions for the Foreclosure of Mortgages.
- Chap. CXXXIX. Liens and Preferred Claims of Mechanics and Others.
- Chap. CXL. Actions for Nuisance. Waste and Wilful Trespass in Certain Cases.
- Chap. CXLI. Actions Concerning Real Property.
- Chap. CXLII. Possessory Actions of Public Lands.
- Chap. CXLIII. Actions for the Partition of Real Property.
- Chap. CXLIV. Actions for the Usurpation of an Office or Franchise.
- Chap. CXLV. Trials in Civil Actions.
- Chap. CXLVI. Judgment in Civil Actions.
- Chap. CXLVII. Exceptions.
- Chap. CXLVIII. New Trials.
- Chap. CXLIX. Execution.
- Chap. CL. Proceedings Supplementary to Execution.
- Chap. CLI. Appeals in Civil Actions.

CHAPTER CXXV.

FORM OF CIVIL ACTIONS.

Section.

3112. One form of civil action only.

3113. Parties to actions, how designated.

Section.

3114. Special issues, how tried.

Section 3112. One Form of Civil Action Only: There is in this state but one form of civil actions for the enforcement or protection of private rights or the redress or prevention of private wrongs: *Provided*, That in all matters not regulated by this Code, in which there is any conflict or variance between the rules of equity jurisprudence and the rules of the common law, with reference to the same matter, the rules of equity shall prevail.

1887 R. S. Sec. 4020.

See also Const. Art. V, Sec. 1.

REMEDY: Equity will not relieve where the parties have had a plain and speedy remedy at law, of which by their own negligence they have not availed themselves.—*Wilkerson et al. v. Walters et al.* 1 Idaho, 564.

EQUITY—ACTIONS: An action will not lie in a court of equity to enforce a decree against a person not a party to such decree, nor will such action lie against one who is a party to such decree, when he remains within the jurisdiction and is amenable to the process of the court which rendered the decree.—*Ray v. Ray*, 1 Idaho, 566.

COURT OF EQUITY: There is no power in a court of equity to confirm or enforce a void judgment by a subsequent proceeding instituted for the purpose.—*Ray v. Ray*, 1 Idaho, 566.

The effect of the section is to abolish the distinction in the form of actions, but the general principle which governs particular forms of actions at common

law is retained, thus where the plaintiff in an action against factors for the conversion of goods waives the tort, the proof required is the same as in an action of assumpsit.—*Lubert v. Chauviteau*, 3 Cal. 458, 38 Am. Dec. 415.

A cause of action in tort may be united with a cause of action in contract if they both arise out of the same transaction.—*Jones v. Steamship Cortes*, 17 Cal. 487, 79 Am. Dec. 142, but the section does not permit a party declaring upon a certain cause of injury to give evidence of other causes not specifically pleaded, which were concurrent and intimate with it.—*Benedict v. Bray*, 2 Cal. 251, 56 Am. Dec. 332.

Section extends only to the form of pleading, the distinction between law and equity continues as marked as ever, and to entitle the plaintiff to the equitable interposition of the court, he must show a proper case and one in which there is no adequate remedy at law.—*DeWitt v. Hays*, 2 Cal. 463, 56 Am. Dec. 352.

Section 3113. Parties to Actions how Designated: In such actions the party complaining is known as the plaintiff, and the adverse party as the defendant.

1887 R. S. Sec. 4021.

Section 3114. Special Issues, How Tried: A question of fact not put in issue by the pleadings may be tried by a jury upon an order for the trial, stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial.

1887 R. S. Sec. 4022.

Const. Idaho, Art. 5, Sec. 1, provides: "Feigned issues are prohibited and the

facts at issue shall be tried by order of court, before a jury."

CHAPTER CXXVI.

TIME OF COMMENCING ACTIONS.

Section.

IN GENERAL.

- 3115. Commencement of civil actions for the recovery of real property.
- 3116. Action by the state.
- 3117. Actions concerning real property.
- 3118. Action or defense arising out of real property.
- 3119. Entry on real estate.

Section.

- 3120. Possession, when presumed. Occupation deemed under title.
- 3121. Occupation under written instrument or judgment, when deemed adverse.
- 3122. What constitutes adverse possession.
- 3123. Presumption when actually occupied under claim of title.

Section.

3124. Adverse possession. Claim of title not written.

3125. Relation of landlord and tenant.

3126. Right of possession not affected by descent cast.

3127. Certain disabilities excluded from time to commence actions.

ACTIONS OTHER THAN FOR RECOVERY OF REAL PROPERTY.

3128. Period of limitations prescribed.

3129. Within six years.

3130. Within five years.

3131. Within four years.

3132. Within three years.

3133. Within two years.

3134. Within one year.

3135. Within six months.

3136. Cause of action accrues on mutual account.

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3151. Actions against directors, etc. Limitations prescribed.

3152. Acknowledgment must be in writing.

3153. Limitation laws of other states: effect of.

3154. Word "action" construed, how.

IN GENERAL.

Section 3115. Commencement of Civil Actions:

Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action shall have accrued, except when in special cases, a different limitation is prescribed by statute.

1887 R. S. Sec. 4030.

SCHEDULE OF PROVISIONS OF CODE IN SUBSEQUENT CHAPTERS AFFECTING LIMITATIONS OF ACTIONS OR PROCEEDINGS: Actions to foreclose liens of laborers and material men, must be commenced within six months after claim filed or expiration of credit if given, not exceeding two years: Sec. 3342.

Action to foreclose liens upon logs, timber products, etc.: Sec. 3356.

Election contest, twenty days after votes canvassed: Sec. 3799.

Forcible entry and detainer, within one year: Sec. 3988.

Application for relief from judgment on ground of surprise or excusable neglect and from default judgments when without personal service: Sec. 3241.

After rejection of claims by executor or administrator, three months: Sec. 4142.

Actions to contest will, one year after probate: Sec. 4023.

Action to recover land sold by executor or administrator, within three years after the sale: Sec. 4205, action to set aside sale, fraud, etc., within three years after the discovery of fraud.—Id.

Minors may commence actions mentioned in Sec. 4205 within three years after removal of disability: Sec. 4206.

Specific performance land contracts of decedents, within six months after dismissal by probate court of petition for conveyance: Sec. 4229.

Minor ward against guardian to recover real estate sold by guardian within three years after majority: Sec. 4392.

Against administrator, contesting allowance of account by minors, within two years after disability removed: Sec. 4257.

Suit on guardian's bond, within three years from discharge of guardian: Sec. 4391, except plaintiff under disability to sue.

Pleading statute of limitations: Sec. 3229.

STATUTE OF LIMITATIONS. PERSONAL PRIVILEGE: The statute of limitations is a personal privilege which goes to the remedy, and not the right. The defendant may plead it or waive it. If he fails to plead it in any form, he thereby waives it, and he cannot take advantage of his waiver in the appellate court.—*Craft v. Greathouse*, 1 Idaho, 254.

The statute of limitations is a personal privilege, and, to be made available, must be pleaded. It can not be interposed by argument or inference.—*Frantz v. Idaho Artesian Well & Drilling Co.* (Idaho), 46 Pac. 1026.

ACTS UPON THE REMEDY—NOT UPON THE DEBT—STATUTE OF LIMITATIONS: The statute of limitations acts upon the remedy and not upon the debt, and the running of the statute does not extinguish the debt nor impair the lien of the mortgage given to secure the same and the subsequent acknowledgment of the debt revives the remedy on the mortgage.—*Kelly et al. v. Leachman* (Idaho), 33 Pac. 44.

MORTGAGE — DEBT SECURED BY: But one action can lie for the recovery of any debt secured by a lien upon real or personal property in this state, and where such action is barred by the statute of limitations as to the debt the lien is carried with it, and is likewise barred; and whatever will prevent the running of the statute upon one will prevent it upon both.—*Law v. Spence* (Idaho), 48 Pac. 282.

WHEN THE STATUTE BEGINS TO RUN: The statute of limitation begins to run from the time when the action may properly be commenced.—*Pridgeon v. Greathouse*, 1 Idaho, 539.

EFFECT OF STATUTE EXTENDING TIME: A law extending the time within which actions may be commenced can only affect causes of action existing at the time of its passage. It cannot revive cause of action already barred; and as to existing causes of action the time must be computed from the period when the action might have been commenced, and not from the passage of the law extending the time.—*Pridgeon v. Greathouse*, 1 Idaho, 359.

ACTIONS AGAINST TRUSTEES: The statute of limitations does not begin to run against a cestui que trust until the deed is denied, and some act is done by the trustee inconsistent with the trust. — *Nasholds v. McDonell* (Idaho), 55 Pac. 894.

CONSTRUCTION OF STATUTE—EXCEPTIONS — GENERAL APPLICATION: General words in the statute must receive a general construction, and if there be no express exceptions the court can create none.—*Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

DEFENSE NOT DISFAVORED: The statute should receive a reasonable construction in the furtherance of its manifest object. The defense may be interposed as a matter of right.—*Anaconda Mining Company v. Saile*, 13 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472.

IS A STATUTE OF REPOSE: The benefit of which may be relinquished by the party interested but cannot be taken from him without his consent. One joint obligor cannot by acknowledgment deprive the other of its benefit. It is applicable to actions to en-

force security to a debt and may be pleaded by subsequent purchaser of property from mortgagor.—*McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754.

EQUITABLE ACTIONS: The statute is applicable to a cause of action in equity as well as to one in law.—*Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146.

LACHES AND STALE CLAIMS: For extended discussion of equitable doctrine as applied independent of statutes of limitation and as affecting such statutes: See note following *Bell v. Hudson*, 2 Am. St. Rep. 795. As applied to partnership accounting.—*Bell v. Hudson*, 73 Cal. 285, 14 Pac. 791.

WHEN THE STATUTE BEGINS TO RUN: The general doctrine that the statute commences to run from the time that an action may properly be commenced is applicable to all classes of cases.

Against judgment, statute begins to run from the time of its entry in the records of the court.—*Crim et al. v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491.

Note payable on demand from date.—*O'Neil v. Magner*, 81 Cal. 631, 22 Pac. 876, 15 Am. St. Rep. 88.

Banker's certificate of deposit, payable on demand from date and no special demand necessary.—*Brummagin v. Tallant*, 29 Cal. 503, 89 Am. Dec. 61, but by Sec. 3137 post. statute does not begin to run until an authorized demand.

Actions by sureties, joint tortfeasors, etc., for indemnity or contribution for actual damages, from the time judgment actually paid.—*Oaks v. Scheifferly*, 74 Cal. 478, 16 Pac. 252; *Culmer v. Wilson*, 13 Utah, 129, 44 Pac. 833, 57 Am. St. Rep. 713.

Stockholders' liability for corporate indebtedness, statute runs from date and not maturity of indebtedness.—*Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87.

Action for reward for apprehension of criminal from time of conviction.—*Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634.

Special contract for attorney fees, contingent upon amount of judgment from time of actual receipt of money from defendant.—*Bartlett v. O. F. Savings Bank*, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139.

Adverse possession by mortgagee under deed intended as mortgage, statute begins to run from delivery of deed if time not specified for the payment of the money.—*Borden v. Clow*, 21 Nev. 275, 30 Pac. 821, 37 Am. St. Rep. 511.

Express trust, the statute begins to run from the time of repudiation of the trust.—*Fox v. Tay*, 89 Cal. 339, 26 Pac.

897, 23 Am. St. Rep. 474, or until trustee with knowledge of the cestui que trust has disavowed the trust.—*Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384; see also 40 Am. St. Rep. 107.

In action for specific performance, land contract, by vendee in possession, the statute does not run so long as he remains in possession with acquiescence of vendor, relation being that of a continuing trust.—*Love v. Watkins*, 40 Cal. 547, 6 Am. Rep. 624.

Statute begins to run against purchaser at sheriff sale from the time that deed is delivered to purchaser.—*Leonard v. Flynn*, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500.

Statute begins to run, on official bonds, from close of term of office.—*People v. Vanness*, 79 Cal. 85, 21 Pac. 554, 12 Am. St. Rep. 134.

Statute begins to run against an account stated from the date of the statement.—*Kahn v. Edwards*, 75 Cal. 192, 16 Pac. 779, 7 Am. St. Rep. 141.

Fraud and mistake, action for relief on ground of, run from time of discovery: Sec. 3132, sub. 4, and annotations thereunder.

Bailment.—The statute does not begin to run in favor of a bailee until he denies the bailment and converts the property to his own use.—*Reizenstein v. Marquardt* (Iowa), 1 L. R. A. 318, and as to when the statute commences to run generally, see note.—*Id.* pages 318 and 319 and 7 L. R. A. 658.

Agreement not to sue, upon a particular demand until the happening of a particular event suspends the running

of the statute.—*Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344.

Disability to sue, the absence of a perfect cause of action does not constitute.—*Berkin v. Marsh*, 18 Mont. 152, 44 Pac. 528, 56 Am. St. Rep. 565, nor is the running of statute postponed by failure to make demand as against party failing to.—*Barnes v. Glide*, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153.

Statute in favor of sureties does not protect principal, action against guardian not barred although statute run against sureties under Sec. 4392. See *Berkin v. Marsh*, 18 Mont. 152, 44 Pac. 528, 56 Am. St. Rep. 565.

Actions on account, Sec. 3136, from last item. Mutual and open accounts, defined.—*Norton v. Largo*, 30 Cal. 123, 89 Am. Dec. 70.

Pleading statute: Sec. 3229, should be pleaded in first instance and courts will not usually permit it to be brought in by amendment.—*Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348. Complaint, action apparently barred, alleging new promise.—*Porter v. Elam*, 25 Cal. 291, 85 Am. Dec. 132.

Defendant should plead facts to bring himself within the statute.—*Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146.

Fraud, complaint for relief on ground of, should aver acts discovered within three years.—*Id.* See also *Castro v. Geil*, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84.

Pleading after vacating a default, court may permit.—*Anaconda Mining Company v. Saile*, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472.

FOR THE RECOVERY OF REAL PROPERTY.

Section 3116. Action by the State: The people of this State will not sue any person for or in respect to any real property or the issues or profits thereof, by reason of the right or title of the people to the same unless:

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or

2. The people or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof within the space of the ten years.

1887 R. S. Sec. 4035.

Section 3117. Actions Concerning Real Property: No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within five years before the commencement of the action; and this Section includes possessory rights to lands and mining claims.

1887 R. S. Sec. 4036.

When statute begins to run in this and subsequent sections: Notes Sec. 3115.

Trespass upon real property, action must be brought within three years: Sec. 3132.

Adverse possessions, Sec. 3120.

Action includes special proceedings: Sec. 3154.

Mining claims cannot be located where adverse parties have been in continuous possession of ground for the period of five years.—*Ah Kle v. Gregory* (Idaho), 34 Pac. 812.

Land dedicated to public use not subject to the operation of statute: *County of Yolo v. Barney*, 79 Cal. 375, 21 Pac. 833, 12 Am. St. Rep. 152; nor can title to street be acquired by par-

ties by adverse possession.—*City of Visala v. Jacobs*, 65 Cal. 434, 4 Pac. 433, 52 Am. Rep. 303.

Purchaser, land adversely held: Limitation runs from time his grantors action first accrued. Purchaser, judicial or mortgage sale, subject to this rule.—*Leroy v. Rogers*, 30 Cal. 229, 89 Am. Dec. 88.

Statute applicable to adverse possession of riparian rights: *Alta Land Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217 and note.

To water rights: *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554.

Irrigation ditches, adverse user: *Hesperia Land Company v. Rogers*, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209.

Section 3118. Action or Defense Arising Out of Real Property:

No cause of action, or defense to an action arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appears that the person prosecuting the action, or making the defense is made, or the ancestor, predecessor, or grantor, of such person was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made.

1887 R. S. Sec. 4037.

Non-resident claimant: Fact that party claiming real estate is a non-resident of the state does not affect or

qualify this section: Sec. 3143, post. not applicable.—*Chollar-Potosi Mining Co. v. Kennedy*, 3 Nev. 361, 93 Am. Dec. 409.

Section 3119 Entry on Real Estate: No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within five years of the time when the right to make it descended or accrued.

1887 R. S. Sec. 4038.

Section 3120. Possession, When Presumed. Occupation Deemed Under Title:

In every action for the recovery of real property, or the possession thereof, a person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by another person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action.

1887 R. S. Sec. 4039.

Granting of easement does not prevent statute running against one claiming adversely, to grantor of the same.—*San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542.

Fee once acquired by five years possession continues until conveyed or lost by five years adverse possession.—*Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205.

Adverse possession must be continuous under assertion of right, successive fraudulent and wrongful entries is not sufficient.—*San Francisco v. Fulda*, 37 Cal. 349, 99 Am. Dec. 278.

Real estate, adverse relation not affected nor defeated by buying outstanding title from one cotenant.—*Frick v. Sinon*, 75 Cal. 337, 17 Pac. 439, 7 Am. St. Rep. 177.

Section 3121. Occupation Under Written Instrument or Judgment, When Deemed Adverse: When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree or judgment, or of some part of the property under such claim, for five years, the property so included is deemed to have been held adversely except that when it consists of a tract divided into lots, the possession of one lot, is not deemed a possession of any other lot of the same tract.

1887 R. S. Sec. 4040.

EJECTMENT—EQUITABLE TITLE—LOCATION OF SIOUX HALF-BREED SCRIP—ADVERSE POSSESSION: The mere location of Sioux half-breed scrip, issued under the act of July 17, 1854 (10 Stat. 304), vests in the locator only an equitable title, upon which ejectment cannot be sustained in a federal court prior to the issuance of a patent.

The erection of two houses on two lots of a vacant and uninclosed town block, by one holding title to the whole block under a deed describing it as

composed of a number of lots, and referring to a plat which shows it to comprise two tiers of lots, separated by an alley, is not, as mere matter of law, constructive possession of the entire half block in which the two lots are situated.

(Error to Circuit Ct. of Appeals. Case originated in Dist. Ct. Idaho and removed to U. S. Circuit Ct., Idaho Dist.)—Carter v. Ruddy, 166 U. S. 493 (17 Sup. Ct. Rep. 640.)

Tax deed is color of title.—Wilson v. Atkinson, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299.

Section 3122. What Constitutes Adverse Possession:

For the purpose of constructing an adverse possession by a person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;
2. Where it has been protected by a substantial inclosure;
3. Where, although not inclosed it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant;
4. When a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not enclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

1887 R. S. Sec. 4041.

Adverse possession, essential elements of.—DeFrieze v. Quint, 94 Cal.

653, 30 Pac. 1. 28 Am. St. Rep. 151. See note to last cited report as to occupancy and notice, pages 158 to 162.

Section 3123. Presumption When Actually Occupied Under Claim of Title: Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

1887 R. S. Sec. 4042.

CONVENTIONAL BOUNDARIES—ADVERSE POSSESSION: When co-

terminous owners of land establish a boundary line and take possession to the line so agreed upon, and one of

them erects valuable improvements thereon, and holds quiet and peaceable possession thereof, without objection from the other coterminous owner or his grantees, for a period of more than

eight years, such line is binding upon them, and those holding under them.—*Idaho Land Co. v. Parsons*, 2 Idaho, 1191, 31 Pac. 4043.

Section 3124. Adverse Possession. Claim of Title. Not Written: For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure;
2. Where it has been usually cultivated or improved.

Provided, however, That in no case shall adverse possession be considered established under the provisions of any Sections of this Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, State county, or municipal, which have been levied and assessed upon such land according to law.

1887 R. S. Sec. 4043.

ADVERSE POSSESSION — PAYMENT OF TAXES: Adverse possession cannot be established unless it is shown that the party claiming it has paid all the taxes assessed against the property for five years.—*Green v. Christie* (Idaho), 40 Pac. 54.

PAYMENT OF TAXES — WHEN STATUTE BECAME EFFECTIVE: Adverse possession could be established

under the laws of this territory prior to May 21, 1881, without proving payment of taxes. Section 150, Code Civ. Proc. (See 10 Gen. Laws 1880-81, p. 29) made it necessary, in order to establish adverse possession, to prove the payment of taxes.—*Boise v. Boise City Railway & Terminal Co.* (Idaho), 51 Pac. 753; *Urquides v. Flanagan* (Idaho), 61 Pac. 514.

Section 3125. Relation of Landlord and Tenant:

When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy or where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods herein limited.

1887 R. S. Sec. 4044.

Section 3126. Right of Possession not Affected by Descent Cast: The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property.

1887 R. S. Sec. 4045.

Section 3127. Certain Disabilities Excluded from Time to Commence Actions: If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, be at the time such title first descends or accrues, either:

1. Within the age of majority; or

2. Insane; or

3. Imprisoned on a criminal charge, or in execution, upon conviction of a criminal offense, for a term less than for life; or,

4. A married woman, and her husband be a necessary party with her in commencing such action or making such entry or defense;

The term during which such disability continues is not deemed any portion of the time in this Chapter limited for the commencement of such action or the making of such entry or defense, but such action may be commenced, or entry or defense made within the period of five years after such disability shall cease, or after the death of the person entitled who shall die under such disability but such action shall not be commenced, or entry or defense made, after that period.

1887 R. S. Sec. 4046.

ACTIONS OTHER THAN FOR RECOVERY OF REAL PROPERTY.

Section 3128. Periods of Limitations Prescribed:

The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

1887 R. S. Sec. 4050.

Section 3129. Within Six Years: Within six years:

1. An action upon a judgment or decree of any court of the United States, or of any State or territory within the United States.

2. An action for mesne profits of real property.

1887 R. S. Sec. 4051.

Haupt v. Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698. This action however, barred after six years, under the provisions of this section: See *Haupt v. Burton*, Id.; but it would seem that on a judgment other than for the recovery of the money, there is no limitation under the provisions of Sec.

3535: See *Maun v. McAtee*, 37 Cal. 11.

Statute begins to run against judgment upon its entry on the records of the court.—*Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491.

Action to revive a judgment.—*Haupt v. Burton*, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698.

Section 3130. Within Five Years: Within five years:

An action upon any contract, obligation, or liability founded upon an instrument in writing.

1887 R. S. Sec. 4052.

NOTE SECURED BY MORTGAGE: A mortgage given to secure the payment of a note is a mere incident to the note, and its foreclosure is not barred so long as an action upon the note is not barred.—*Moulton v. Williams* (Idaho), 55 Pac. 1019.

Action for specific performance to convey land within this section.—*Pearis v. Covillaud*, 6 Cal. 617, 65 Am. Dec. 543.

Mere receipt for money not a contract, but special receipt may be within meaning of section.—*Ashley v. Vischer*, 24 Cal. 322, 85 Am. Dec. 65.

Section 3131. Within Four Years: Within four years:

An action upon a contract, obligation, or liability, not founded upon an instrument of writing.

1887 R. S. Sec. 4053.

ACCOUNT STATED: If statement of open account is verbal it is governed by this section; if written by Sec. 3130.—*Kahn v. Edwards*, 75 Cal. 192, 16 Pac.

779, 7 Am. St. Rep. 141. This section applies to liabilities arising from torts.—*Lattin v. Gillette*, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; *Bannock Co. v. Bell* (Idaho), 65 Pac.

Section 3132. Within Three Years: Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture;
2. An action for trespass upon real property;
3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property;
4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

1887 R. S. Sec. 4054.

Statutory penalty: Sec. 3133, Sub. 2. Executors and administrators, action to set aside by, within three years after discovery of fraud: Sec. 4205.

ACTION FOR PENALTY OR FORFEITURE: Under the provisions of Subdivision 1, Section 4054, Rev. St., an action to recover liability created by statute other than a penalty or forfeiture must be commenced within three years.—*Canyon County v. Ada County (Idaho)*, 51 Pac. 742.

PROCEEDINGS TO REVIVE JUDGMENT: A proceeding to revive an original judgment under the provisions of Section 4498 of the Rev. St., which declares that if the purchaser of real estate sold under execution fail to recover possession thereof "in consequence of some irregularity in the proceedings concerning the sale," does not accrue until the period of redemption has expired and action thereon may, under Section 4054, Rev. St., be maintained at any time within three years thereafter, or after the giving of the sheriff's deed therefor. — *Cantwell v. McPherson (Idaho)*, 34 Pac. 1095.

Sub 3. Pledgee of corporate stock has a right to hold the stock under the terms of the pledge, but during such time he cannot assert that he holds it adversely and thereby acquire title under the statute of limitations.—*Cross v. Eureka Lake and Yuba Canal Co.* 73 Cal. 302, 14 Pac. 885, 2 Am. St. Rep. 808; and an action brought within three years after an assertion of adverse title by pledgee is not barred by the statute of limitations under Sub. 3 of said section.—*Latta v. Tutton*, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 80.

Sub. 4. **FRAUD:** For cases illustrating the general doctrine that the statute commences to run only from the discovery of the facts constituting the fraud, see generally for the application to the statutes of limitation of the equitable doctrine, that a party is precluded from deriving benefit for his own wrongful concealment. Note 25 L. R. A. 566. In an action to recover damages for fraudulently and clandestinely violating contract in relation to good will of business.—*Gregory v. Speiker*, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70. In actions to quiet title against the heirs of plaintiff's grantor and to the point that the statute applies to equity cases, and the necessity of proper allegations as to time of discovery in complaint to avoid bar of the statutes.—*Castro v. Geil*, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84. Actions by creditors to set aside fraudulent conveyance of property.—*Brow v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314. The mere concealment by a firm of the relationship of a dormant partner is not such a fraud as to prevent the running of the statute against the creditors of the firm.—*Soule v. Atkinson*, 18 Cal. 225, 79 Am. Dec. 174.

LACHES AND DILIGENCE: Injured party is bound to use due diligence to detect the fraud.—*Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219, and note; and when guilty of great laches in the prosecution of his remedy will be barred in equity on account of the paramount importance of having the title settled.—*Seculovich v. Morton*, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106.

Section 3133. Within Two Years: Within two years:

1. An action against a sheriff, coroner, or constable, upon the liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution;
2. An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or to an individual and the State, except where the statute imposing it prescribes a different limitation;
3. An action upon a statute or upon an undertaking in a criminal

action for a forfeiture or penalty to a county or to the people of the State;

4. An action to recover damages for the death of one caused by the wrongful act of another;

5. An action for libel, slander, assault, battery, false imprisonment or seduction;

6. An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

1887 R. S. Sec. 4055.

Section 3134. Within One Year: Within one year

An action against an officer or officer de facto:

1. To recover any goods, wares, merchandise, or other property seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise or other personal property so seized, or for damages for the seizure, detention, sale of or injury to, any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure;

2. For money paid to any such officer under protest, or seized by such officer in his official capacity as a collector of taxes, and which, it is claimed, ought to be refunded.

1887 R. S. Sec. 4056.

Section 3135. Within Six Months: Actions on claims against a county which have been rejected by the board of commissioners, must be commenced within six months after the first rejection thereof by such board.

1887 R. S. Sec. 4057.

When boards of county commissioners have made adjustment and settlement of matters growing out of the organization of a new county, such

settlement and adjudgment will not be disturbed, in the absence of a showing of fraud or mistake.—*Canyon County v. Ada County (Idaho)*, 51 Pac. 742.

Section 3136. Cause of Action Accrues on Mutual Account: In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

1887 R. S. Sec. 4058

Mutual accounts defined as those where there is an express or implied understanding that mutual debts shall be satisfied or set off pro tanto between the parties. A mere payment, whether

in money or property, does not make an actual account mutual. The statute in relation to mutual accounts fully discussed.—*Norton v. Larco*, 30 Cal. 127 89 Am. Dec. 70, and notes pages 75 to 85.

Section 3137. No Limitation: To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings and loan society, no limitation begins to run until after an authorized demand.

1887 R. S. Sec. 4059.

Section 3138. Actions for Relief not Hereinbefore Provided for: An action for relief not hereinbefore provided for

must be commenced within four years after the cause of action shall have accrued.

1887 R. S. Sec. 4060.

An action upon a judgment rendered in a foreign country falls within the provisions of this section, and is barred

in four years.—*Dore v. Thornburgh*, 99 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100; *Bannock County vs. Bell* (Idaho), 65 Pac.

Section 3139. Actions by the People Subject to Limitations of This Chapter: The limitations prescribed in this Chapter, apply to actions brought in the name of the State, or for the benefit of the State, in the same manner as to actions by private parties.

1887 R. S. Sec. 4061.

ACTION BY COUNTY FOR MONEY WRONGFULLY WITHHELD: Limitation does not run against a county to recover public money wrongfully withheld by one of its financial agents.—*Fremont County v. Brandon* (Idaho), 56 Pac. 264.

Where the duty to be performed or the right to be enforced is of a strictly public nature, it is not subject to the law of limitations.—*Elmore County et al. v. Alturas County et al.* (Idaho), 37 Pac. 349.

SAME, INDEBTEDNESS PAYABLE FROM SPECIAL FUND: A county cannot plead limitation to an action against it to enforce an obligation payable from a particular fund without first showing that it has provided such fund.—(In error to Circuit Court., U. S. for Dist. Idaho.)—*Robertson v. Blaine County*, 90 Fed. Rep. 63, overruling same case, 85 Fed Rep. 735. *Bannock County v. Bell* (Idaho), 65 Pac.

Section 3140. Action to Redeem a Mortgage: An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage.

1887 R. S. Sec. 4062.

Mortgagor cannot maintain ejectment against mortgagee in possession, even after statute has run against the debt, without payment of the same.—*Spect v. Spect*, 88 Cal. 437 26 Pac. 203, 22

Am. St. Rep. 314. Statute begins to run from time that right of action accrues on the debt secured.—*Cunningham v. Hawkins*, 24 Cal. 403, 85 Am. Dec. 73.

Section 3141. When There are Two or More Such Mortgages: If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action under the provisions of this Chapter, any one of them who is entitled to maintain such an action, may redeem therein a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises, bears to the whole of such premises.

1887 R. S. Sec. 4063.

GENERAL PROVISIONS.

Section 3142. When an Action is Commenced: An

action is commenced within the meaning of this Chapter, when the complaint is filed.

1887 R. S. Sec. 4068.

WHEN COMMENCED: An action is not commenced until a complaint is placed in the hands of the clerk, or de-

posited in his office with directions to file the same.—Gold Hunter Mining Co. v. Holleman, 2 Idaho, 839, 27 Pac. 413.

Section 3143. Where Defendant is Out of State: If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

1887 R. S. Sec. 4069.

Section 3144. Persons Under Disabilities: If a person entitled to bring an action, other than for the recovery of real property, be, at the time the cause of action accrued, either:

1. Within the age of majority; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term of less than for life; or
4. A married woman, and her husband be a necessary party with her in commencing such action:

The time of such disability is not a part of the time limited for the commencement of the action.

1887 R. S. Sec. 4070.

Disabilities in actions concerning real property: Sec. 3127.

Disability must exist when cause of action accrues: Sec. 3149.

Co-existing disabilities: Sec. 3150.

Absence from state: Sec. 3143.

Death before limitation expires: Sec. 3145.

Alien subject of country at war: Sec. 3146.

Judgment reversed: Sec. 3147.

Action stayed by injunction: Sec. 3148.

Sub. 4. Statute runs against a married woman in cases where her husband is not a necessary party.—Wilson v. Wilson, 36 Cal. 447, 95 Am. Dec. 194.

Section 3145. Where Person Entitled Dies Before Limitation Expires: If a person entitled to bring an action die before the expiration of the term limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

1887 R. S. Sec. 4071.

Presentation of claim to administrator is equivalent to the commencement

of an action.—Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237; Estate of Schroeder, 46 Cal. 317.

Section 3146. In Suits by Aliens, Time of War to be Deducted: When a person is an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action.

1887 R. S. Sec. 4072.

Section 3147. Where Judgment has been Reversed:

If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives may commence a new action within one year after the reversal.

1887 R. S. Sec. 4073.

Section 3148. Where Action is Stayed by Injunction: When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

1887 R. S. Sec. 4074.

Section 3149. Disability must Exist when Right of Action Accrues: No person can avail himself of a disability, unless it existed when his right of action accrued.

1887 R. S. Sec. 4075.

DISABILITY MUST EXIST AT THE TIME THE CAUSE OF ACTION ACCRUES: Where a person in whose favor a cause of action for the recovery of real estate exists, and who is under

no disability, dies, the statute does not cease running against those to whom the property is devised or descends, notwithstanding their disability at that time.—*McLeran v. Benton*, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814.

Section 3150. When Two or More Disabilities Exist, Etc. When two or more disabilities co-exist at the time the right of action accrues, the limitation does not attach until they are removed.

1887 R. S. Sec. 4076.

Section 3151. Actions Against Directors, Etc., Limitations Prescribed: This Chapter does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

1887 R. S. Sec. 4077.

Stockholder's liability for his proportionate share of the corporate indebtedness, is a liability created by law within the meaning of the section. Upon the liability upon a corporation note, the statute commences to run from date of execution and not from its maturity.—*Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87. Running of statute is not affected by a suspension of the remedy against the corporation or by the renewal of its note, unless stockholder is still a member of the corporation when the new note was given and a new liability thereby created.—*Hyman v. Coleman*,

82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178.

Against stockholders of savings bank the statute begins to run from the commencement of each deposit, and the action will be barred as to all deposits made more than three years before the commencement of the action.—*Wells v. Black*, 117 Cal. 157, 48 Pac. 1090, 59 Am. St. Rep. 162; against subscribers of capital stock to compel payment of unpaid subscriptions, at the suit of creditors, the statute commences to run from the time of a call by the corporation.—*Thompson v. Reno Savings Bank*, 19 Nev. 171, 7 Pac. 870, 3 Am. St. Rep. 881.

Section 3152. Acknowledgment Must be in Writing: No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the op-

eration of this Chapter, unless the same is contained in some writing, signed by the party to be charged thereby.

1887 R. S. Sec. 4078.

ACKNOWLEDGMENT OR PROMISE TO PAY DEBT, DEBT SECURED BY MORTGAGE: An indorsement upon a note secured by mortgage, acknowledging the debt evidenced by the note, signed by the maker, who is also the mortgagor, does not create, extend, or renew either the principal obligation or the mortgage, and is not void under Section 3351, Rev. St., as such acknowledgment affects the remedy on the note and mortgage, and not the contract or obligation.—*Moulton v. Williams* (Idaho), 55 Pac. 1019; *Kelly v. Leachman* (Idaho), 33 Pac. 44; *Law v. Spence* (Idaho), 48 Pac. 282.

AGREEMENT TO PAY INTEREST: A promise in writing signed by the party to be charged thereby, to pay the interest due upon the whole of a pre-existing debt, given by the debtor to the creditor, is an unequivocal acknowledgment of the whole debt, from which a promise to pay the same may and ought to be implied.—*Kelly v. Leachman* (Idaho), 33 Pac. 44.

ACCOUNT STATED: To take a case out of the statute if limitations on an account, the acknowledgment of the debt or the promise to pay it must be in writing signed by the party to be charged thereby; and this, whether the original cause of action was or was not barred at the time of the acknowledgment or promise.—*Reed v. Smith*, 1 Idaho, 533.

STATING AN ACCOUNT: The stating of an account is in the nature of a new promise depending for its validity upon the construction of the old debt; but the evidence of such promise must be in writing, or the action will be barred by the statute of limitations.—*Reed v. Smith*, 1 Idaho, 533.

The acknowledgment must be unqualified and the promise definite.—*Braithwaite v. Harvey*, 14 Mont. 208, 36 Pac. 38, 43 Am. St. Rep. 635, and in the case of a conditional promise the creditor can only recover by showing an acceptance by him of the offer made as a compliance by him of the prescribed conditions.—*McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170, and note. An acknowledgment by one joint obligor will not bind another unless made by authority expressly given or resulting from relation of parties.—*McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754. The principal governing acknowledgments, equally applicable where an attempt made to enforce a security.—See *McCarthy v. White*, *Id.*, and where the principal obligation has never become barred there is no occasion to renew the mortgage under the provision of the Civil Code by a writing executed with the same formalities required in the case of a grant of real property.—*London and S. F. Bank v. Bandman*, 120 Cal. 220, 52 Pac. 583, 65 Am. St. Rep. 179.

Section 3153. Limitation Laws of Other States; Effect of: When a cause of action has arisen in another State or territory, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued.

1887 R. S. Sec. 4079.

Section 3154. Word "Action" Construed How: The word "action" as used in this Chapter, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

1887 R. S. Sec. 4080.

CHAPTER CXXVII.

PARTIES TO CIVIL ACTIONS.

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PROPER PARTIES GENERALLY.

Section 3155. To be in Name of Party in Interest:

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by this Code.

1887 R. S. Sec. 4090.

Parties definition of, plaintiff and defendant: Sec. 3113.

Special proceedings, parties designated as plaintiff and defendant: Sec. 3786.

Executors, trustees of express trust, etc., as parties: Sec. 3157.

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Parties, actions for nuisances: Sec. 3373.

Parties, actions for partition: Sec. 3389.

Mandamus, party beneficially interested, proper party plaintiff: Sec. 3770.

Election contest, contestant: Sec. 3798.

Parties to prosecution of guardian's bond: Sec. 3390.

PARTY TO CONTRACT. ANOTHER BENEFICIALLY INTERESTED: When a contract is made with a party in which another has a beneficial and resulting interest, the party with whom the contract was made has the right to recover, though he alleges the injury only to be to the stranger to the instru-

ment or contract.—*People v. Slocum et al.* 1 Idaho, 62.

ACTION FOR BENEFIT OF COUNTY, CORPORATE NAME: Since the 1st of June, 1887, the date when the Revised Statutes of Idaho went into effect, an action for the benefit of a county, and where the demand sued upon is the property of the county, must be in the corporate name of the county.—*United States v. Shoup*, 2 Idaho, 459, 21 Pac. 656.

INJUNCTION, TAXPAYERS RESTRAINING ISSUE OF BONDS: A taxpayer, resident of the county, may sue to enjoin the issuance of funding bonds which are about to be issued for debts contracted in violation of the provisions of the constitution.—*Dunbar v. Board of Commissioners of Canyon County* (Idaho), 49 Pac. 409.

RESTRAINING REMOVAL OF COUNTY RECORDS: Citizens who are residents, electors and taxpayers of a county may bring a suit for injunction to prohibit the removal of the county records from a place alleged to be the county seat of the county, and to test the legality of such selection when there is no speedy and adequate remedy at law.

Note.—Chapter CLV provides a remedy for the contesting of elections of county seats and the removal of county seats.—*Doan v. Board of County Commissioners of Logan County*, 2 Idaho, 781, 26 Pac. 167.

Objection that plaintiff is not the real party in interest, not available, where recovery by him will bar another

action.—White v. Steam Tug Mary Ann, 6 Cal. 462, 65 Am. Dec. 523.

Assignee of judgment must sue in his own name in action to revive.—Haupt v. Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698.

On contract made by agent undis-

closed principal may sue in his own name, but subject to equities against agent.—Ruiz v. Morton, 4 Cal. 355, 60 Am. Dec. 618.

Contract for benefit of third party, when he may sue thereon: See note 71 Am. St. Rep. 176.

Section 3156. Assignment not to Prejudice Defense:

In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this Section does not apply to a negotiable instrument, transferred in good faith and upon good consideration, before maturity.

1887 R. S. Sec. 4091.

ASSIGNEE, PROPER PARTY PLAINTIFF, PARTIES: The assignee of a chose in action is in all cases the proper party to sue.—Brumback v. Oldham, 1 Idaho, 709.

WHEN ASSIGNOR RETAINS INTEREST: The assignee of an account may bring an action upon it in his own name, though the assignor retains

an interest in it.—Brumback v. Oldham, 1 Idaho, 709.

EQUITIES: The assignee of a chose in action takes it subject to all equities existing at the time of the assignment.—Brumback v. Oldham, 1 Idaho, 709.

CONSIDERATION: The consideration of an assignment need not be alleged or proved.—Brumback v. Oldham, 1 Idaho, 709.

Section 3157. Executor, Trustee May Sue Without Beneficiary:

An executor, or administrator, or trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this Section.

1887 R. S. Sec. 4092.

Public administrator as party plaintiff: Sec. 4330.

Guardian of an infant, appointed by probate court, is not trustee within the meaning of the section, and an action to recover money due the ward must be brought in the name of the infant by his guardian.—Fox v. Minor, 32 Cal. 111, 91 Am. Dec. 566.

A trustee of an express trust, having a lease in his name as such trustee, may sue to enjoin trespassers upon the leased property, without joining with him those for whose benefit the action is prosecuted.—Kellog et al. v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74.

Section 3158. Married Woman as Party: When a married woman is a party, her husband must be joined with her, except:

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone;
2. When the action is between herself and her husband, she may sue or be sued alone;
3. When she is living separate and apart from her husband, by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone.

1887 R. S. Sec. 4093.

Contracts by married women: See Civil Code.

Sole traders, married women, duly declared such, may sue and be sued alone without joining husband: Sec. 3804.

RECOVERY OF HOMESTEAD:

Wife cannot sue alone.—Adams v. Gorham, 6 Cal. 71, 65 Am. Dec. 481, and note; 14 Cal. 506, 76 Am. Dec. 440, and note.

In suit to recover money loaned to wife to purchase land, which became

community property, she is not a proper party defendant, though deed taken in her name.—*Althof v. Conheim*, 38 Cal. 230, 99 Am. Dec. 363.

Husband and wife must join in an action for an injury done to the person

of the latter, and it is immaterial that the injury, while amounting to a tort, is charged to have been committed in violation of a contract.—*Sheldon v. Steamship Uncle Sam*, 18 Cal. 527, 79 Am. Dec. 193.

Section 3159. Wife May Defend, When: If a husband and wife be sued together, the wife may defend her own right, and if the husband neglect to defend, she may defend for his right also.

1887 R. S. Sec. 4094.

Stowell et al. v. Tucker (Idaho), 62 Pac. 1033.

Section 3160. Infant, Etc., to Appear by Guardian: When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian, or by a guardian ad litem appointed by the court in which the action is pending in each case, or by a judge thereof, or a probate judge. A guardian ad litem may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him.

1887 R. S. Sec. 4095.

The power of the court to appoint guardian ad litem is not affected by the statute relating to general guardians: Sec. 4352. But general guardian must appear unless special appointed: Sec. 4358.

PARTIES: The guardian of an incompetent person is neither necessary nor a proper party to an action upon a note and mortgage assigned by the in-

competent person to the plaintiff.—*Redmond v. Peterson et al.* 102 Cal. 595, 36 Pac. 923, 41 Am. St. Rep. 204.

A judgment against an infant where no guardian ad litem has been appointed is not for that reason void.—*Childs v. Lanterman*, 103 Cal. 387, 37 Pac. 382, 42 Am. St. Rep. 121.

A guardian ad litem has no power to contract for attorney fees.—*Cole v. Superior Court*, 63 Cal. 86, 49 Am. Rep. 78.

Section 3161. Guardian, How Appointed: When a guardian ad litem is appointed by the court or judge he must be appointed as follows:

1. When the infant is plaintiff; upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of a relative or friend of the infant;

2. When the infant is defendant; upon the application of the infant, if he be of the age of fourteen years and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application or any other party to the action, or of a relative or friend of the infant;

3. When an insane or incompetent person is party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.

1887 R. S. Sec. 4096.

UPON THE TRIAL OF A CAUSE: Where appointment of guardian ad litem, in the first instance, is held void the court may permit a new petition

and forthwith make an appointment and allow the trial to proceed.—*Foley v. California Horseshoe Co.* 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87.

IN CERTAIN TORT ACTIONS.

Section 3162. Unmarried Female May Sue for Her Own Seduction: An unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.

1887 R. S. Sec. 4097.

Section 3163. Father May Sue for Seduction of Daughter: A father, or, in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of a daughter, under the age of majority at the time of the seduction, and the guardian for the seduction of a ward, under the age of majority at the time of the seduction, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service.

1887 R. S. Sec. 4098.

Section 3164. Suit for Injury or Death of Child: A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person.

1887 R. S. Sec. 4099.

EVIDENCE — CONTRIBUTORY NEGLIGENCE: When damage is claimed for the death of a minor child, the evidence must affirmatively show, that the accident resulted from the negligence of defendant, and that the negligence of plaintiff did not contribute to the result.—*Spokane & P. Ry. Co. v. Holt* (Idaho), 40 Pac. 56; *Lehman v. City of Brooklyn*, 29 Barb. 234.

INSTRUCTION — NEGLIGENCE: The instruction as to the law of negligence, as given and found in the transcript, is the correct rule in this case.—*Holt v. Spokane & P. Ry. Co.* (Idaho), 35 Pac. 39.

DAMAGES — NEGLIGENCE — PARENT AND CHILD: In an action by a father against a person negligently causing a personal injury to his child, he can recover such damages only as he has himself sustained, leaving to the infant a further right of recovery of such damages as are personal to himself. The plaintiff is not entitled to recover damages for the pain or suffering which his son experienced from the in-

juries which he received, or for his disfigurement therefrom.—*Durkee v. The Central Pacific R. R. Co.* 56 Cal. 388, 38 Am. Rep. 59.

IN AN ACTION BY A MOTHER FOR THE DEATH OF MINOR CHILD: A verdict of twenty thousand dollars was set aside as excessive, where there was no averment or proof of any special damage. In an action by a parent to recover damages for the death of a minor child caused by negligence of the defendant, such damages are limited by the actual pecuniary injury sustained by the parent by reason of the death of the child, the main element of which is the probable value of the services of the deceased until its majority, considering the cost and support of its maintenance during the early and helpless part of its life. Sorrow and mental anguish caused by the death are not elements of damage in such case and the loss of society can only be considered for the purpose of estimating the pecuniary loss.—*Morgan v. The Southern Pacific Co.* 95 Cal. 519, 30 Pac. 603, 29 Am. St. Rep. 143.

Section 3165. When [Representatives May Sue, Damages: When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the

person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding Section such damages may be given as under all the circumstances of the case may be just.

1887 R. S. Sec. 4100.

MEASURE OF DAMAGES — INSTRUCTIONS: As to the measure of damages, the court, on its own motion, instructed the jury that if they found for the plaintiff they should award him "such damages as they think him entitled to." Held, error: that it gave the jury an arbitrary discretion to assess damages as caprice, whim or passion might suggest, regardless of the amount demanded by the complaint, or shown by the evidence. It relieves the jury of every restriction, and authorizes them to grant such damages as they may "think" plaintiff entitled to, whether under all the circumstances of the case they be just or not.

Prior to giving the instructions above referred to, the court instructed the jury that if they found for the plaintiff "such damages may be given as, under the circumstances of the case may be just," and among other things in awarding damages, they might take into consideration "the relation found as existing between plaintiff and deceased, and the injury if any sustained by plaintiff in the loss of said deceased child's society." Held, error. The expression "all the circumstances of the case" as used in section 4100 Rev. St. 1887 means relevant circumstances presented to jury by evidence under the pleadings. No demand was made in the complaint because of the loss of said infant's society, and no proof was offered showing the relations existing between plaintiff and said infant.

Where the court gives inconsistent or contradictory instructions the judgment will be reversed.—*Holt v. Spokane & P. Ry. Co. (Idaho)*, 35 Pac. 39.

The court did not err in refusing to instruct the jury that in an action by a parent for the death of his minor child, the measure of damages "is the value of the child's services until he becomes of age, less the expense of his support during that time."—*Holt v. Spokane & P. Ry. Co. (Idaho)*, 35 Pac. 39.

PROOF—JURY: Under section 4100. Rev. St. 1887, in this class of cases, certain elements based upon proof may be taken into consideration: yet, without

proof, the jury should not consider them.—*Holt v. Spokane & Pac. Ry. Co. (Idaho)*, 35 Pac. 39.

MEASURE OF DAMAGES — DISFIGURING: Disfigurement caused by a tortious injury is an element of general damage, but annoyance caused by contemplation of such disfigurement is too remote to be considered as an element of damage.—*Giffin et ux v. City of Lewiston (Idaho)*, 55 Pac. 545.

CONSTRUCTION OF CODE: But one action is permitted, and that may be brought either by the heirs of the deceased or by his personal representatives; and when one action is brought that is the only action which the statute permits and the pendency of a prior action may be pleaded in abatement, or the judgment rendered therein may be pleaded in bar of the second action.

ACTION BY PERSONAL REPRESENTATIVE, DAMAGES: Pecuniary loss, which the heirs might sustain by the death is one of the circumstances to be considered in fixing such damages as, under all the circumstances of the case, may be just.

REMOTE DAMAGES: The sorrow, grief and mental suffering of a wife or mother of the deceased are not included, and no damages can be allowed therefor, though the jury may take into consideration the loss of the comfort, society and protection of the deceased.

Exemplary or vindictive damages are not recoverable, but must be confined to the pecuniary loss suffered by the kindred, and their loss of the comfort, society, support and protection of the deceased.

NO TRANSFER OF RIGHT: The action given by the statute is a new action, and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury.

Damages recoverable are not assets of the estate, but are for the benefit of the heirs.—*Munro v. Dredging, Etc. Co.* 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248.

JOINDER OF PARTIES.

Section 3166. Who May be Joined as Plaintiffs:

All persons having an interest in the subject of the action, and in

obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this Code.

1887 R. S. Sec. 4101.

Section 3167. Who May be Joined as Defendants:

Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant.

1887 R. S. Sec. 4102.

Parties, unknown owners as defendants in eminent domain: Sec. 3847.

Any occupant or person interested may appear and defend in eminent domain: Sec. 3849.

Parties, defendant, forcible entry and detainer: Sec. 3981.

Parties, joinder, executor appointed, but who has not qualified need not be: Sec. 4218.

Parties, mortgage foreclosure: Sec. 3331.

Bringing in new parties: Sec. 3179.

Parties, effect, service on one out of several defendants: Sec. 3197.

Parties in actions to determine conflicting claims to real property: Sec. 3379.

Several tort feasons, not acting in concert, although the consequences of the several torts to plaintiff to produce an injury to plaintiff cannot be joined in an action for damage.—*Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523; but may be enjoined from continuing the wrong, causing such damage.—*Miller v. Highland Ditch Co.* 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254.

Persons who will not be affected by the judgment are not necessary parties.—*Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344.

Cestui que trust is necessary party to suit for foreclosure of a mortgage executed by a trustee upon the trust estate; and if such cestui que trust be a married woman her husband is also a necessary party.—*Mavrich v. Grier*, 3 Nev. 52, 93 Am. Dec. 373.

In an action to reform the certificate of acknowledgment to an instrument, the notary before whom the acknowledgment was taken is not a necessary party defendant.—*Hutchinson v. Ainsworth*, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

If a debtor assigns his property to trustees to be prorated among his creditors, one creditor cannot, after the property has been converted into money

maintain an action against the trustees for his pro rata share, without making the other creditors parties, and the assignor a defendant.—*McPherson v. Parker et al.* 30 Cal. 455, 89 Am. Dec. 129.

Fraudulent grantor is a proper but not a necessary party defendant in an action to subject to a lien of a judgment the property alleged to have been fraudulently conveyed.—*Blanc v. The Paymaster Mining Co.* 95 Cal. 524, 50 Pac. 765, 29 Am. St. Rep. 149.

Divorced husband not necessary party defendant in an action by wife against purchaser to set aside deed made pending divorce proceedings.—*Powell v. Campbell*, 20 Nev. 232, 29 Pac. 156, 19 Am. St. Rep. 350.

In an action by a taxpayer to compel the cancellation of an order drawn on the county superintendent of public schools, and to restrain him from drawing a requisition on the county auditor, the parties interested in the order and the superintendent of schools may be properly joined as parties defendant.—*Shakespear v. Smith*, 77 Cal. 638, 20 Pac. 294, 11 Am. St. Rep. 327.

A county cannot be made a party defendant, except where specially authorized by statute.—*Hunsager v. Borden*, 5 Cal. 288, 63 Am. Dec. 130.

A party confined in the state prison for a term less than life, may be made a party defendant in an action and his property applied in satisfaction of his debt, during the term of his imprisonment. In the Matter of the Estate of *Ellen Nerac*, deceased, 35 Cal. 392, 95 Am. Dec. 111.

The plaintiff in ejectment may sue one or more defendants, and they may answer separately, or demand separate verdicts, unless they do so they will be concluded by the general verdict.—*Winans v. Christy*, 4 Cal. 70, 60 Am. Dec. 597.

In an action by one of several cestuis que trust, to declare and enforce an implied trust in relation to land, all the persons who are entitled to or claim to

be entitled to a portion of the trust estate are proper parties defendant.—*Jenkins v. Frink et al.* 30 Cal. 586, 89 Am. Dec. 134.

Section 3168. Defendants in Action to Determine Adverse Claims: In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants; and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action against whom the judgment has passed.

1887 R. S. Sec. 4103.

Parties to actions to determine conflicting claims to real property: Sec. 3379.

New parties bringing in: Sec. 3178.
1887 R. S. Sec. 4104.

Claimants under common source of title may sever, when: Sec. 3173.

Section 3169. Claimants Under a Common Source of Title May Unite: Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

A tenant in common of an undivided portion of a tract of land is entitled to the possession of the whole tract as against all persons except his co-tenants, and as a consequence may against

all others than them maintain ejectment for the entire premises.—*Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108.

Section 3170. Parties in Interest When to be Joined: Of the parties to the action, those who are united in interest must be joined as plaintiffs, or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

1887 R. S. Sec. 4105.

Misjoinder and non-joinder: Sec. 3206.

MULTIPLICITY OF SUITS: The doctrine of the interposition of a court of equity, to prevent a multiplicity of suits, cannot be maintained where there is simply a multitude of individuals, plaintiffs, whose several interests are not dependent upon one another.—*Wilkerson et al. v. Walters et al.* 1 Idaho, 564.

Creditor of corporation may sue for benefit of himself and other creditors who may choose to come in, establish their claims, and contribute to the expense of the suit, to subject the unpaid

subscription of a stockholder to the satisfaction of their claims.

Stockholder may be sued by creditor of corporation to subject unpaid subscription to satisfaction of his judgment without making the other stockholders parties defendant.—*Thompson v. Reno Savings Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

When one partner sues for an injury to the partnership property, and makes his co-partner a defendant for want of his consent to join as plaintiff, the recovery must be for the whole injury.—*Nightingale v. Seannett*, 6 Cal. 506, 65 Am. Dec. 525.

Section 3171. Suing Different Parties to Commercial Paper: Persons severally liable upon the same obligation or

instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

1887 R. S. Sec. 4106.

In an action on a joint and several bond, all or any of the sureties may be joined in one suit.—*State v. McDonald et al.* (Idaho), 40 Pac. 312.

Covenant not to sue made to portion of joint debtors does not release any of them.—*Matthey v. Gally*, 4 Cal. 62, 60 Am. Dec. 595.

Section 3172. Associates May be Sued by Name of Association: When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants and had been sued upon their joint liability.

1887 R. S. Sec. 4112.

Judgment against unincorporated association only by common name of the "Red Star Mining Company" entered by the clerk by default, upon a complaint entitled as against "M. Walsh et al." composing the "Red Star Min-

ing Co." after return of due service upon Walsh, is not void, when the complaint substantially avers the facts required by statute to authorize a suit against such an association by its common name.—*Walsh v. Kirkpatrick*, 30 Cal. 202, 89 Am. Dec. 85.

Section 3173. Tenants in Common, Etc., May Sever: All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.

1887 R. S. Sec. 4107.

Claimants under common source of title may unite: Sec. 3169.

Actions for the diversion of waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action.—*Parke v. Kilham*, 8 Cal. 77, 68 Am. Dec. 310.

One tenant in common may maintain an action against a trespasser for the

whole property and the judgment recovered determines the right of possession of the whole premises, and the effect of the recovery inures to the benefit of other co-tenants not suing, so as to prevent the acquisition of title by adverse possession as against them pending the action.—*Newman v. Bank of California*, 80 Cal. 368, 22 Pac. 261, 13 Am. St. Rep. 169.

SUBSTITUTION, INTERPLEADER, INTERVENTION, BRINGING IN PARTIES.

Section 3174. Action, When not to Abate. Substitution: An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action or proceedings survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

1887 R. S. Sec. 4108.

Death after verdict or decision and before judgment: Sec. 3508.

Death of debtor, insolvency proceedings action does not abate. Sec. 3948.

Plaintiff becoming insolvent, pending action, claim survives in assignee: Sec. 3908.

Administrator with will annexed, upon discovery of will after administration, may prosecute to final judgment action commenced by predecessor: Sec. 4089.

Survival of actions: Secs. 4211 et seq.

ATTORNEYS—DEATH OF CLIENT—POWERS TO BIND REPRESENTATIVES: If a party to an action die after the rendition of judgment, and before filing and serving notice of appeal, the authority of the deceased's attorney to act terminates, and any sub-

sequent action of the attorney, before substitution, will not bind the representatives of the deceased, or any other party in interest.—*Coffin v. Edgington*, 2 Idaho, 595, 23 Pac. 80.

DEATH OF DEFENDANT DURING THE PENDENCY OF AN ACTION: In an action to recover judgment on a promissory note, the suggestion of the death of the defendant, and the substitution of his administrator, subjects the proceedings to such rules as are applicable to proceedings for the collection of claims against an estate of a deceased person. The lien of the attachment is destroyed and the attached property passes into the hands of the administrator, to be administered on in due course of administration.—*Myers v. Mott*, 29 Cal. 351, 89 Am. Dec. 49.

Section 3175. Another Person may be Substituted for Defendant: A defendant against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value, to such person as the court may direct; and the court may, in its discretion, make the order.

1887 R. S. Sec. 4109.

SUPPLEMENTAL COMPLAINT: Matters changing the relations of the parties to a suit, or either of them, which affect the matter in litigation, and which have transpired since the

filing of the original complaint, are proper matters for supplemental complaint.—*Dennison v. Wilcutt, et al.* (Idaho), 35 Pac. 698; *McCauley v. Sears* (Idaho), 34 Pac. 814.

Section 3176. Conflicting Claims, Interpleader, Substitution: Whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.

1887 R. S. Sec. 4110.

Action to determine conflicting claims to personal property or rights in money obligation may be maintained; also, against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as a surety: Sec. 3743.

AGREED CASE: An order by which

a third party, a stranger to the suit, without his consent is made a party to an agreed case, is without authority of law, and all the proceedings thereunder are coram non iudice.—*Potter v. Talkington et al.* (Idaho), 59 Pac. 362, cited in *Blumauer-Frank Drug Co. v. Branstetter* (Idaho), 43 Pac. 575.

Section 3177. Intervention, when and how: Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared and upon the attorneys of parties who have appeared, who may answer or demur to it as if it were an original complaint.

1887 R. S. Sec. 4111.

RIGHTS OF INTERVENOR: An intervenor is a party to a suit, and his substantial rights are as sacred as the original parties' and entitled to the same protection.—*Gold Hunter Mining Co. v. Holleman*, 2 Idaho, 839, 27 Pac. 413.

INTERVENTION: The right of intervention given by statute exists only in actions which are purely civil in their character. The statutory proceedings in the nature of a quo warranto is quasi criminal in character and in such action the right does not exist.—*People ex rel. Glidden v. Green et al.* 1 Idaho, 235.

POWER OF COURT—PARTIES: The court has the right at any time to call in other parties, or to cause proceedings to be amended in that particular, by striking out or adding the names of any parties which may be necessary to accomplish the ends of

justice, and secure the interests of all.—*Oro Fino and Morning Star Mining Company v. Cullen et al.* 1 Idaho 113.

INTERVENTION — SUFFICIENCY OF COMPLAINT: The court below allowed McClelland to intervene. Held, that his complaint in intervention sets forth facts sufficient to bring him within the requirements of Section 4111 Rev. St. Idaho.—*Pence v. Sweeney*, 2 Idaho, 914, 28 Pac. 413.

After defendant's default has been entered, and nothing remains but to enter the judgment, a complaint in intervention cannot be filed.—*Safely v. Caldwell*, 17 Mont. 184, 42 Pac. 766, 52 Am. St. Rep. 693.

Subsequent attaching creditors may intervene at any time before the entry of the judgment for the purpose of contesting the validity of the first attachment.—*Speyer v. Ihmels & Co.* 21 Cal. 280, 81 Am. Dec. 157.

Section 3178. When to Decide Controversy or to Order Other Parties Brought in:

The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and thereupon the party, directed by the court, must cause to be served a copy of the summons in the action, and the order aforesaid, in like manner as provided for the service of the summons, upon each of the parties ordered to be brought in, who shall have ten days or such time as the court may order, after service in which to appear and plead and in case such party fail to appear and plead within the time aforesaid, the court may cause his default to be entered and proceed as in other cases of default, or make such other order as the condition of the action and justice shall require, and when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes

application to the court to be made a party, it may order him to be brought in by the proper amendment.

1887 R. S. Sec. 4113.

EQUITABLE ACTIONS, BRINGING IN PARTIES: In equitable actions the plaintiff should bring before the court all parties interested in and connected with the subject matter, so that the questions involved and pertaining to the subject matter may be fully and forever settled.—*Beane v. Givens* (Idaho), 51 Pac. 987.

THE PARTIES TO CIVIL ACTIONS: The grand principle which underlies the doctrine of equity in relation to parties is that every judicial controversy should, if possible, be ended in one litigation; that the decree pro-

nounced in the single suit should determine all rights, interests and claims, should ascertain and define all conflicting relations, and should forever settle all questions pertaining to the subject matter.—*Pomeroy on Code Remedies*, Sec. 247.

The omission of the defendant to demur for want of parties does not affect the power or the court under this section, from directing other parties to be brought in, if it finds that it cannot completely determine the case in their absence.—*Grain et al. v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423.

CHAPTER CXXVIII.

PLACE OF TRIAL OF CIVIL ACTIONS.

PLACE OF TRIAL OF CIVIL ACTIONS.	Section
Section.	3183. Right waived unless demanded by defendant.
3179. Action affecting realty triable where subject situated.	3184. Grounds for change.
3180. Other sections where the cause arose.	3185. Court to which cause must be transferred.
3181. Place of trial of actions against counties.	3186. Papers to be transmitted. Costs Jurisdiction.
3182. Actions according to residence of parties.	3187. Proceedings after judgment in certain cases transferred.

Section 3179. Action Affecting Realty Triable where Subject Situated: Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, as provided in this Code:

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest and for injuries to real property;
2. For the partition of real property;
3. For the foreclosure of a mortgage of real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

1887 R. S. Sec. 4120.

Section 3180. Other Actions where the Cause Arose: Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of court to change the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute, except, that when it is imposed for an offense committed on a lake, river or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river,

or stream, and opposite to the place where the offense was committed;

2. Against a public officer, or person specially appointed to execute his duties, for any act done by him in virtue of his office; or against a person who, by his command or in his aid, does anything touching the duties of such officer.

1887 R. S. Sec. 4121.

Sub. 2. Applies only to affirmative acts of the officer, by which, in the execution of process or otherwise, he interferes with the property or rights of

third persons, and not to mere omissions or neglect of official duty.—*McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655.

Section 3181. Place of Trial of Actions Against Counties: An action against a county may be commenced and tried in such county, unless such action is brought by a county, in which case it may be commenced and tried in any county, not a party thereto.

1887 R. S. Sec. 4122.

Section 3182. Actions According to Residence of Parties: In all other cases the action must be tried in the county in which the defendants, or some of them reside at the commencement of the action; or, if none of the defendants reside in the State, or, if residing in this State, the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if the defendant is about to depart from the State, such action may be tried in any county where either of the parties reside or service is had; subject however, to the power of the court to change the place of trial as provided in this Code. *Provided*, That in all actions against life or fire insurance companies suit or action may be commenced and tried in the county where the death occurred or the loss was sustained.

1887 R. S. Sec. 4123; 1899, 5th Ses. p. 293; 1897 4th Ses. 9, beginning with the word "provided."

Injunctions against state officers triable in county where duties performed: Sec. 3290.

Receivership, corporations, where principal business transacted: Sec. 3319.

ACTION AGAINST FOREIGN CORPORATION, VENUE: Under Rev. St. Sec. 2653, providing that a foreign corporation shall appoint some person resident in the county in which is its principal place of business to accept service for it, and granting to those complying therewith like privileges with similar domestic corporations. A defendant foreign insurance company

which has so complied, is entitled to a trial in the county where its principal place of business is located.—*Easley v. New Zealand Ins. Co. (Idaho)*, 38 Pac. 405.

If a transitory cause of action arises in another state, the plaintiff has the right, in the absence of statute fixing the place of trial, to bring his suit in any county of the state where he may be, and where he finds the defendant, and in which the court may obtain jurisdiction of the defendant by service of process or appearance. The rule is the same though one or both parties are non-residents.—*Steed v. Harvey*, 18 Utah, 367, 72 Am. St. Rep. 789, 54 Pac. 1011.

Section 3183. Right Waived Unless Demanded by Defendant: If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county.

1887 R. S. Sec. 4124.

Section 3184. Grounds for Change: The court may, on motion, change the place of trial in the following cases:

1. When the county designated in the complaint is not the proper county;
2. When there is reason to believe that an impartial trial cannot be had therein;
3. When the convenience of witnesses and the ends of justice would be promoted by the change;
4. When from any cause the judge is disqualified from acting.

1887 R. S. Sec. 4125.

Judge, when disqualified: Sec. 3029.

ISSUABLE FACT, PRACTICE: The question of changing the place of trial, in order that the defendant may have an impartial trial, involves an issuable fact, and when an application is made for that purpose upon affidavits, it is proper to admit counter affidavits, to enable the court to judge of the necessity for such change.—Hyde v. Harkness, 1 Idaho, 601.

BURDEN OF PROOF: The burden of showing that an impartial trial cannot be had is on the party making the application, and even if there is a slight preponderance of evidence in favor of the application, this court will not reverse the action of the court below for that reason.—Hyde v. Harkness, 1 Idaho, 601.

DISCRETION: Granting a change of venue is a matter in the sound discretion except in cases of abuse.—Hyde v. Harkness, 1 Idaho, 601.

FAIR AND IMPARTIAL TRIAL, CHANGING VENUE: The simple fact that there have been two jury trials without a verdict is not sufficient to

warrant a change of the place of trial, unless it be clearly established that a fair and impartial trial could not be had in the county of defendant's residence.—Semmercamp v. Catlow, 1 Idaho, 716.

WITNESSES FROM NEIGHBORING STATES. The convenience of witnesses residing in a neighboring state will not entitle a party to a change of the place of trial.—Shirley v. Nodine et al. 1 Idaho, 696.

SUFFICIENCY OF APPLICATION: The mere fact that the party moving for the change believes that the witnesses will voluntarily attend, is not sufficient, without stating on what grounds the belief is founded.—Shirley v. Nodine et al. 1 Idaho, 696.

Affidavit for change of venue, upon information and belief, without stating facts upon which such belief is founded, is insufficient. Same. Disqualification of judge on ground of interest. Proof required and sufficiency on appeal. In absence of direct proof, presumed that judge acted on his own knowledge, and that he had no interest.—Table Mountain Mining Co. v. Mining Co. 4 Nev. 218, 97 Am. Dec. 526.

Section 3185. Court to which Cause must be Transferred: If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, or if for any cause the court orders the place of trial to be changed, it must be transferred for trial to a court the parties may agree upon by stipulation in writing, or made in open court and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist, as follows:

1. If in the district court, to another district court;
2. If in the probate court, to the district court of the same county;
3. If in a justice's court, to another justice's court in the same county.

1887 R. S. Sec. 4126.

DISQUALIFIED JUDGE CANNOT SETTLE PRELIMINARY MOTIONS: A judge who is qualified from acting as judge on the trial of a cause pending before the court of which he is a judge is also disqualified from acting upon any preliminary motion calling for the

exercise of judicial discretion in such action.—Gordon et al v. Connor et al. (Idaho), 51 Pac. 747.

DUTY OF JUDGE MANDATORY: When the district judge is disqualified from acting as a judge in a case pending in his court, and a motion for a change of venue is made by either

party to the action on the ground of such disqualification, it is the duty of such judge to grant a change of venue,

and such duty is mandatory and not discretionary.—Gordon et al. v. Connor et al. (Idaho), 51 Pac. 747.

Section 3186. Papers to be Transmitted. Costs. Jurisdiction:

When an order is made transferring an action or proceeding for trial, the clerk of the court, or justice of the peace, must transmit the pleadings and papers therein to the clerk or justice of the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

1887 R. S. Sec. 4127.

Venue, change of, appeal to supreme court, from order granting or denying, within what time: Sec. 3573.

ORDER DENYING CHANGE. APPEAL. Presumption in absence of

direct proof that judge not disqualified by interest. Same. Damages for delay, imposed unless reasonable ground for appeal shown.—Table Mountain Mining Co. v. Mining Co. 4 Nev. 218, 97 Am. Dec. 526.

Section 3187. Proceedings after Judgment in Certain Cases Transferred:

When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to any court of a county other than the county in which the real estate, or some portion of it, is situated, the clerk of such court must, after final judgment therein, certify, under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated, a copy of the judgment. The clerk receiving such copy must file, docket, and record the judgment in the records of the court, briefly designating it as a judgment transferred from court (naming the proper court).

1887 R. S. Sec. 4128.

CHAPTER CXXIX.

MANNER OF COMMENCING CIVIL ACTIONS.

FILING AND ENDORSEMENT OF COMPLAINT.

Section.

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LIS PENDENS.

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SUMMONS, ISSUE AND SERVICE.

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3198. Proof of service, how made.

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FILING AND INDORSEMENT OF COMPLAINT.

Section 3188. Action, How Commenced: Civil actions in the courts of this State are commenced by filing a complaint.

The plaintiff, at the time of filing the complaint in such action, shall pay to the clerk of said court the sum of three dollars, which

sum said clerk shall, on the first Monday of each month after the receipt thereof, pay into the State treasury, and it shall be placed by the State treasurer to the credit of the general fund.

The clerk must indorse on the complaint, the year, month, day, hour and minute that it is filed.

1887 R. S. Sec. 4138 and 1899 5th Ses. p. 164, Sec. 7; and part of Sec. 4139, as amended, 5th Ses. p. 271.

Deposit required at commencement of insolvency proceedings includes fees for mailing notice to creditors: Sec. 3904.

Clerk must enter each cause in the register of actions: Sec. 3746.

Suit deemed pending until time for taking appeal has lapsed: Sec. 3742.

Security for costs may be required from non-residents, and proceedings stayed until given: Sec. 3734.

Limitation of actions, when action deemed commenced: Sec. 3115.

Filing complaint, commencement of action within the meaning of the statute of limitations: Sec. 3142.

STATUTE OF LIMITATIONS: Action is commenced within the meaning of the statute at the time of filing complaint, notwithstanding that Sec. 3199, post, provides that a court acquires jurisdiction, etc., from the time of service of the summons. *Haupt v. Burton*, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698.

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Section 3189. Notice of Pendency of Action, How Given: In an action affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file for record with the recorder of the county in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

1887 R. S. Sec. 4142.

Action deemed pending until final termination or time for appeal has lapsed: Sec. 3742.

In partition actions, provisions for filing lis pendens immediately after filing complaint, mandatory: Sec. 3397.

Person in possess of real property, action against, cannot be prejudiced by any alienation, made by him: Sec. 3387.

LIS PENDENS: The filing of a notice of lis pendens is not a conveyance, nor is the person filing it a purchaser, and, as such, protected against pre-existing unrecorded conveyances.—*Baker v. Bartlett*, 18 Mont. 446, 45 Pac. 1084,

56 Am. St. Rep. 594; *Warnock v. Harlow et al.* 96 Cal. 298, 31 Pac. 166, 31 Am. St. Rep. 209.

Lis pendens is notice of all facts apparent on the face of the pleadings, and of those other facts of which the facts so stated necessarily put the purchaser on inquiry; and if a wife who sues for a divorce describes in the complaint the property of her husband, and asks to have it set aside to her for her support, the rule of lis pendens can be invoked by her against one who purchases during the pendency of the action, and with notice thereof.—*Powell v. Campbell*, 20 Nev. 232, 20 Pac. 156, 19 Am. St. Rep. 350.

SUMMONS, ISSUE AND SERVICE.

Section 3190. Summons, Waiver of: At any time within one year after filing complaint the plaintiff may have a summons issued; and if the action be brought against two or more defendants who reside in different counties, may have a summons issued for each

of said counties. But at any time within the year after the complaint is filed, the defendant may in writing, or by appearing and answering or demurring, waive the issuing of summons, or if the action be brought upon a joint contract of two or more defendants, and one of them has appeared within the year, the other or others may be served or appear after the year, at any time before trial.

1887 R. S. Sec. 4139, amended 1899, 5th Ses. p. 271; 1895 3d Ses. p. 139.

Admission of service by defendant: Sec. 3198.

Waiver, power of attorney to bind client: Sec. 3095.

Appearance: Secs. 3199 and 3714.

Alias summons, Sec. 3192.

VOLUNTARY APPEARING: Where party voluntarily appears in court, he will be subject to the same jurisdiction as if brought in by regular process.—Wilson v. Wilson (Idaho), 57 Pac. 708.

SUBMISSION TO JURISDICTION, INFANT APPEARING BY ATTOR-

NEY: If a defendant, though not served with process, seeks such relief at the hands of the court as is consistent only with the hypothesis that the court has jurisdiction of the cause and of his person, he thereby submits himself to the jurisdiction of the court, and a judgment rendered against him, though an infant, in an action in which he has appeared by an attorney will be upheld as fully as though he had appeared in person.—Childs v. Lanterman, 103 Cal. 387, 37 Pac. 382, 42 Am. St. Rep. 387.

Section 3191. Summons, How Issued, Directed, and what to Contain: The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court and must contain:

1. The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed;
2. A statement of the nature of the action in general terms;
3. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within twenty days if served out of the county, but in the district in which the action is brought, and within forty days if served elsewhere;
4. In an action arising on contract, for the recovery of money or damages only, a notice that unless the defendant so appears and answers, the plaintiff will take judgment for the sum demanded in the complaint (stating it);
5. In other actions, a notice that unless defendant so appears and answers, the plaintiff will apply to the court for the relief demanded in the complaint. The name of the plaintiff's attorney must be indorsed on the summons.

1887 R. S. Sec. 4140.

Eminent domain, summons contains notice to show cause why property should not be condemned: Sec. 3848.

Election contests, summons in, time for appearance: Secs. 3801 and 3802.

Partition, summons, to whom directed: Sec. 3398.

Requisites and service of summons in proceedings against joint debtors not served in the original action to show cause why they should not be bound by judgment: Secs. 3699 and 3700.

Association, service may be on one of the members of: Sec. 3172.

Court may amend and control process: Sec. 3013, Sub. 8.

Service of summons upon new parties brought in by order of the court and their time of appearance: Sec. 3178.

Amendments: Sec. 3241.

NAMES OF PARTIES: A summons to A, B, C or D is a nullity, inasmuch as it is in the alternative, and not to all, nor to either of them. A judgment and execution upon such summons are likewise void for want of jurisdiction of the defendants.—Alexander & Co. v. Leland et al. 1 Idaho, 425.

PLEADING — ANSWER: When a defendant in an action demurs within ten days after service of summons upon him, he has answered, within the meaning of the statute; and no judgment for

want of an answer can be rendered against him.—*Leggett v. Meyers*, 1 Idaho, 548.

DEFECTIVE SUMMONS — PRACTICE: Where a summons is irregular or defective, the remedy, if any, is by application to the trial court to quash or set it aside.—*Parke v. Wardner*, 2 Idaho, 263, 13 Pac. 172.

MISNOMER: If a defendant is actually served with process, though sued by a wrong name, a judgment by default against him is not void.—*Welsh v. Kirkpatrick*, 30 Cal. 202, 89 Am. Dec. 85.

A judgment based upon a summons not attested by the seal of the court is void, and a deed pursuant to a sale under execution issued upon such judgment will be cancelled in equity as a cloud upon complainants title.—*Choate v. Spencer*, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425.

As to jurisdictional defects in summons and like process, generally, see note, Id. 40 Am. St. Rep. 430.—*Sanford v. Edwards*, 19 Mont. 56, 47 Pac. 212, 61 Am. St. Rep. 482, and note 485 to 496.

Section 3192. Alias Summons: If the summons is returned without being served on any or all the defendants, the clerk, upon the demand of the plaintiff, may issue an alias summons in the same form as the original.

1887 R. S. Sec. 4141.

If the first service of a summons is a nullity, the fact that the summons has been returned and filed does not pre-

clude another and perfect service of it, as the summons may be withdrawn and properly served.—*Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738.

Section 3193. Summons, how Served and Returned: The summons may be served by the sheriff of the county where the defendant is found, or by any other person over the age of eighteen, not a party to the action. A copy of the complaint must be served with the summons, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. When the summons is served by the sheriff, it must be returned with the certificate of its service, and of the service of a copy of the complaint, when such copy is served, to the office of the clerk from which it issued. When it is served by any other person, it must be returned to the same place, with an affidavit of such person, of its service, and of the service of a copy of the complaint, when such copy is served.

1887 R. S. Sec. 4143.

Provisions for service by telegraph. Sec. 3717.

PROCESS—WHERE SERVED: A process of the district court may be served upon Indian reservation in any organized county of this territory, if there be no treaty to the contrary with the Indians thereof.—*Hyde v. Harkness*, 1 Idaho, 536.

This section cited in *Guynn v. McDanel* (Idaho), 43 Pac. 74.

Statutes prescribing the manner of service of a summons are mandatory and must be strictly pursued.—*Sanford v. Edwards*, 19 Mont. 56, 47 Pac. 212, 61 Am. St. Rep. 482 and notes 485 to 496. *Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738, and note.

Section. 3194. Summons, Manner of Service: The summons must be served by delivering a copy thereof as follows:

1. If the suit is against a corporation formed under the laws of this State to the president or other head of the corporation, secretary, cashier or managing agent thereof.

2. If the suit is against a foreign corporation, or a non-resident joint stock company, or association doing business and having a managing or business agent, cashier or secretary within this State to such agent, cashier or secretary, or to any station, ticket or other agent of

such corporation transacting business thereof in the county where the action is commenced, and if there is no such agent in said county, then service may be had upon any such agent in any other county.

3. And whenever any foreign corporation or non-resident joint stock company or association, doing business within the State of Idaho, shall not have any designated person actually residing in the county in which said corporation or joint stock company shall be doing business within this State upon whom process issued by authority of or under any law of this State may be served as provided in Section 2162 of the Civil Code of Idaho, or when any such corporation or joint stock company having appointed such person or agent as provided in said Section 2162, and said agent or person so designated, shall have removed from, or ceased to be a resident, or be absent for more than thirty days from said county, then the auditor of said county shall be and is hereby designated as the authorized agent of said corporation or joint stock company upon whom process issued by authority of or under any law of this State may be served with like effect as though said service were made upon the agent or person appointed or designated as provided in Section 2162 of the Civil Code of Idaho.

4. If against a minor under the age of fourteen years residing within this State, to such minor personally, and also to his father, mother or guardian, or if there be none within this State, then to any person having the care or control of such minor or with whom he resides or in whose service he is employed.

5. If against a person residing in this State who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such person and also to his guardian.

6. If against a county, city or town, to the chairman of the board of commissioners, president of the council, or trustee or other head of the legislative department thereof.

7. In all other cases, to the defendant personally.

1887 R. S. Sec. 4144, amended 1899, 5th Ses. p. 293; 1897, 4th Ses. p. 13.

Association sued under common name, service: Sec. 3172.

Service of a writ of mandamus upon majority of a board sufficient: Sec. 3780.

Service of summons on new parties brought in and their time of appearance: Sec. 3178.

On appeal from judgment against a foreign corporation, who has not appeared in the action, the judgment roll must contain evidence of the service of the summons upon that person designated by such corporation upon whom process is to be served under the provisions of Section 2653, Rev. St. or else upon one of the agents or officers of such corporation mentioned in sub-division 2, Sec. 4144, Id.; and if such evidence of service of summons does not appear in the judgment roll, the judgment will be reversed on ap-

peal.—Applington v. G. V. B. Min. Co. (Idaho), 55 Pac. 241.

SERVICE OF SUMMONS—MANAGING AGENTS: A person employed by a foreign mining corporation as a clerk in a store belonging to it, is not the managing agent or cashier of the corporation upon whom summons may be served within the meaning of this section, although he has the custody of money belonging to the corporation, and it is a part of his duty to keep the accounts of the men employed in a mine belonging to the corporation from data furnished him by the superintendent, and to pay them. The word "cashier" in such section refers to an executive officer of a corporation—as the cashier of a bank—and not a simple employe who is not a managing agent.—Blanc v. Paymaster Mining Co. 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149.

SERVICE BY PUBLICATION.

Section 3195. Service by Publication, Order for:

When the person on whom the service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier, or secretary within the State, and the fact appears by affidavit to the satisfaction of the court or a judge thereof, or a probate judge, and it also appears by such affidavit, or by the verified complaint on file that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may make an order that the service be made by the publication of the summons.

1887 R. S. Sec. 4145.

STRICT COMPLIANCE WITH STATUTE REQUIRED: All the requirements of the statute authorizing service of summons by publication must be complied with to give the court jurisdiction.—*Strode v. Strode* (Idaho), 52 Pac. 161.

VARIANCE COMPLAINT — AFFIDAVIT FOR PUBLICATION: An affidavit for publication of summons which describes, as the basis of the action, a cause of action different from the one alleged in the complaint, cannot be made the basis for an order of publication, and publication of summons under such order, is void, and does not give an absent defendant constructive notice of the pendency of the action.—*Vermont Loan & Trust Co. v. McGregor et al.* (Idaho), 51 Pac. 104.

JURISDICTION RESTRICTED: Except in cases affecting the personal status of the defendant, substituted service of process by publication in actions against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose or where a judgment is sought as a means of reaching such property and a personal judgment rendered in a state court, in an action upon a money demand, against a non-resident of the state, without personal service of process upon him within the state or his appearance in the action upon service by publication, is without any validity, and no title to property passes by a sale under an execution issued upon such a judgment.—*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

Decrees quieting title, while not strictly in rem, partake of the nature of judgments in rem, and may, therefore, be supported by the service of process on a non-resident defendant by publi-

cation, and a state has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication.—*Perkins v. Wakeham*, 86 Cal. 580, 25 Pac. 51, 21 Am. St. Rep. 67, and such procedure established by the state is binding on the federal courts.—*Arndt v. Griggs*, 134 U. S. 316, 10 S. Ct. Rep. 557; also *Hart v. Sansom*, 110 U. S. 151.

ATTACHMENT: When a non-resident is served by publication, no personal judgment can be entered against him and where his property is attached in an action upon a money demand, the effect of the judgment is restricted to the property attached.—*Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 28 Am. St. Rep. 314.

FORECLOSURE — DEFICIENCY: And a personal judgment for deficiency in a foreclosure action, based upon such service is void.—*Latta v. Tutton*, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30.

DIVORCE—CUSTODY OF CHILDREN—ALIMONY: So in an action for a divorce the court acquires no jurisdiction to enter a decree for alimony nor for custody or control of the children absent from the state.—*De La Montanya*, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165. See also dissenting opinion, *McFarland*, J. Id. and note 53 Am. St. Rep. 179. As to the general doctrine that a divorce action is in the nature of a proceeding in rem.—*In re Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146.

IN AN ACTION FOR SEPARATE MAINTENANCE: Where a receiver has been appointed to take charge of property specifically described in the complaint the court may render a judgment in rem affecting such property, but cannot properly impose any obligations such as to require the absent husband to execute a bond conditioned for the payment of the alimony allowed.—

Murray v. Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97.

AFFIDAVIT, REQUIREMENTS: An affidavit, stating in the language of the statute "that the defendant has departed from the state and cannot be found therein," is insufficient. It is essential that the probative facts should be stated from which the court can draw the conclusion that due diligence has been used to ascertain the whereabouts of the defendant, and that he cannot be found in the state.—*Palmer v. McMaster*, 13 Mont. 184, 33 Pac. 132, 40 Am. St. Rep. 434; but where the residence is known and stated in the affidavit, such allegations of diligence are unnecessary. Nor in such case need there be a return of an officer that the defendant cannot be found.—*Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

Section 3196. Service by Publication, How Made:

The order must direct the publication to be made in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the state or absent therefrom, must not be less than one month. In case of publication, where the residence of a non-resident or absent defendant is known, the court or judge must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the state, is equivalent to publication and deposit in the postoffice; and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication.

1887 R. S. Sec. 4146.

MAILING COPY TO DEFENDANT: When the record fails to show that a copy of the summons was sent to the address of the defendant, when the order directs that to be done, service by publication is not complete, and does not give the court jurisdiction.—*Strode v. Strode* (Idaho), 52 Pac. 161.

SERVICE OUT OF STATE: Where, after order for publication of summons against an absent defendant has been duly made, the summons is personally served on such absent defendant out of the state, such service does not become complete until the expiration of the time prescribed in the order for publication; and where such order prescribed one month for publication, as in the case at bar, the defendant, served out of the state, has one month and forty days in which to answer, and a default judgment entered against him

FALSE AFFIDAVIT: An affidavit falsely stating that plaintiff has a cause of action when he knows the contrary, operates as a fraud upon the court, and judgment obtained upon it without knowledge of the defendant should be set aside.—*Dunlap v. Steere*, 92 Cal. 344, 28 Pac. 563, 27 Am. St. Rep. 143.

If constructive service of a summons is relied upon to sustain a judgment, there must have been a strict compliance with the provisions of the statute, this being necessary to obtain jurisdiction over the defendant, and the order for the publication of a summons must follow the issuance of a summons and not precede it.—*Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738.

during said time is void, and will be reversed on appeal.—*Bowen v. Harper et al.* (Idaho), 59 Pac. 179.

ORDER, SUFFICIENCY, DEPOSIT IN POSTOFFICE: An order omitting to specify that a deposit be made "forthwith" held sufficient to sustain judgment when the deposit was in fact made the day the order was signed.—*Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34. Deposit may be made by the attorney for the plaintiff and his affidavit is sufficient proof thereof.—*Id.* And may properly be made at the postoffice where the attorney for plaintiff resides, although the order for publication was made at a different place.—*Mudge v. Steinhart*, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17. Where complaint has been amended prior to the order, the amended and not original complaint should be deposited in the postoffice.—*Id.*

PROOF OF AND EFFECT OF SERVICE.

Section 3197. Several Defendants, Part only Served; Proceeding: When the action is against two or more defendants jointly or severally liable on a contract and the summons is served on one or more but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

1887 R. S. Sec. 4147.

Provisions for summoning remaining defendants to show cause why they should not be bound by judgment: Chap. CLXIV, Secs. 3698 to 3703.

Judgment against some defendants,

proceedings to continue against others: Sec. 3497.

A judgment cannot be rendered against property jointly and against one of the owners thereof in a right of action clearly against all jointly.—*Lowe v. Turner et al.* 1 Idaho, 107.

Section 3198. Proof of Service, How Made: Proof of the service of summons and complaint must be as follows:

1. If served by the sheriff, his certificate thereof;
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the postoffice if the same has been deposited; or,
4. The written admission of the defendant. In case of service otherwise than by publication, the certificate or affidavit must state the time and place of service.

1887 R. S. Sec. 4148.

Affidavit of publication, who may make: Sec. 4448.

SERVICE BY PUBLICATION: Unless affidavits are filed showing that all of the requirements of the statute authorizing service by publication have been complied with, the court has no jurisdiction to enter judgment.—*Strode v. Strode* (Idaho), 52 Pac. 161.

DEFAULT, JURISDICTION, PROOF OF SERVICE, SUFFICIENCY, PRESUMPTION: Where judgment by default is collaterally attacked, the only record considered to determine the question of jurisdiction of the person of the defendant is the summons and complaint, and the proof of service required by the provisions of this section and the recitals in the judgment itself. The whole record must be looked to, and if that part of the record called "proof of service" recites facts and acts done which would make it affirmatively show want of jurisdiction then judgment will not be sustained, but recitals in the judgment that the defendant has been duly served are sufficient to support jurisdiction where it does not affirmatively appear from other portions of the record that the recitals are untrue. In courts of inferior and limited jurisdiction, however, the presumption of regularity of proceedings does not obtain, and all jurisdictional

facts must be affirmatively shown by the record.—*Hahn v. Kelley*, 34 Cal. 391, 94 Am. Dec. 742, and notes 765 to 770; see also *In re Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146.

AMENDMENTS OF PROOF OF SERVICE: It is the fact and not the proof of service that is essential to jurisdiction and a judgment by default in a case where proof was imperfect but service in fact made, is not void, and the court may allow proof of service to be amended and filed nunc pro tunc as of the date of the judgment.—*Herman v. Santee*, 103 Cal. 519, 47 Pac. 509, 12 Am. St. Rep. 145. And in an action for divorce, after judgment has been rendered and before the roll has been made up, the court has authority to receive the proof of service of summons, where service by publication.—*In re Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146.

RETURN ON SERVICE OF SUMMONS: Where a man is sued by a fictitious name, and the return of the sheriff, on the summons, shows service on the defendant by his proper name, as "John Doe, alias Westfall," a default being entered, judgment may be rendered against the defendant in his true name, Westfall, without proof that Doe and Westfall are the same.—*Curtis v. Harrick*, 14 Cal. 117, 73 Am. Dec. 632.

Section 3199. Jurisdiction, When Acquired, Appearances: From the time of the service of the summons and of a copy of a complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication, when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him.

1887 R. S. Sec. 4149.

What constitutes an appearance: Sec. 3714.

APPEARANCE, DEFECTIVE SERVICE, WAIVER: If a party, appearing specially for the purpose of moving to quash a summons on account of insufficiency or irregularity of the same, afterwards enters general appearance by filing demurrer or answer, he waives any irregularity or insufficiency in the summons.—*Morris v. Miller* (Idaho), 40 Pac. 60.

JURISDICTION, JUDGMENT, PRESUMPTION: Allegations that a "judgment is void," and that an affidavit for publication of summons is "insufficient," are statements, not of fact, but of legal conclusions.

Every presumption and intendment of law is in favor of the regularity of a judgment of a court of general jurisdiction and to overcome such presumption, in a suit brought to have such judgment declared void, facts must be alleged and proven showing wherein the court failed to obtain jurisdiction to render the judgment which is so attacked.—*Ollis et al. v. Orr et al.* (Idaho), 56 Pac. 162.

APPEARANCE, STIPULATION: Where defendant stipulates in writing that an item of the complaint be increased and that the whole judgment be enlarged to include this increase, such stipulation warrants the judgment for the enlarged amount.—*Grete v. Knott*, 2 Idaho, 18, 3 Pac. 25.

CHAPTER CXXX.

PLEADINGS IN CIVIL ACTIONS.

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IN GENERAL.

Section 3200. Pleadings Defined: The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

1887 R. S. Sec. 4160.

Section 3201. This Code Prescribes Form and Rules: The forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this Code.

1887 R. S. Sec. 4161.

Distinction between forms of action abolished: Sec. 3112.

General rules and construction of pleadings: Sec. 3123 et seq.

Section 3202. What Pleadings are Allowed: The only pleadings allowed on the part of the plaintiff are:

1. The complaint;
 2. The demurrer to the answer;
- And on the part of the defendant:
1. The demurrer to the complaint;
 2. The answer.

1887 R. S. Sec. 4162.

THE COMPLAINT.

Section 3203. Complaint, First Pleading: The first pleading on the part of the plaintiff is the complaint.

1887 R. S. Sec. 4167.

Section 3204. Complaint, What to Contain: The complaint must contain:

1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action;
2. A statement of the facts constituting the cause of action, in ordinary and concise language;
3. A demand of the relief which the plaintiff claims; if the recovery of money or damages be demanded, the amount thereof must be stated.

1887 R. S. Sec. 4168.

Complaint, fictitious name, suing party by: Sec. 3242.

Party refusing to join as plaintiff may be made defendant, reason must be stated: Sec. 3170.

Complaint, account how stated: Sec. 3225.

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Quo warranto, allegations required in: Secs. 3443 and 3444.

Water rights, summary adjudication in: Sec. 3792.

Complaints in special proceedings, see cross-reference under Sec. 3202.

MUST STATE ALL MATERIAL FACTS ESSENTIAL TO RECOVERY: Where the complaint fails to set forth a material fact essential to the establishment of plaintiff's right to recover, the complaint is bad on general demurrer.—*Bingham County v. Woodin* (Idaho), 55 Pac. 662.

SAME RULE APPLIES TO ACTIONS EX DELICTO AS TO THOSE EX CONTRACTU: Under the provisions of subdivision 2, Section 4168, in actions ex contractu or ex delicto the pleader is required to make in his complaint a statement of the facts constituting the cause of action in ordinary and concise language.—*Elliott et al. v. Collins* (Idaho), 55 Pac. 301.

ELECTION OF REMEDIES: In order to employ the doctrine of election of remedies, the party must actually have at his command inconsistent remedies.—*Elliott et al. v. Collins* (Idaho), 55 Pac. 301.

NEGLIGENCE, GENERAL ALLEGATION: Under subdivision 2, Section 4168, Rev. St., which requires the complaint to contain a statement of the facts constituting the cause of action, in ordinary and concise language, a general allegation of negligence, while good against a general demurrer, is not good against a demurrer on the ground of uncertainty.—*King v. Oregon Short Line R. R. Co.* (Idaho), 55 Pac. 665.

FRAUD, UNDUE INFLUENCE: The facts constituting undue influence, like those constituting fraud, must be pleaded; it not being sufficient to aver undue influence, which is a legal con-

clusion.—*Kelly v. Perrault* (Idaho), 48 Pac. 45.

FRAUD, ACTION AGAINST COUNTY OFFICER: It is not necessary to allege specific acts of fraud or deception in the complaint in an action brought to recover back money allowed a county officer as compensation in violation of law.—*Fremont County v. Brandon* (Idaho), 56 Pac. 264.

ALLEGATION OF NEGLIGENCE: A complaint alleging ownership and possession of a certain town lot in defendant, upon which a well is situated, and that through the carelessness and negligence of defendant said well was left open, and that deceased, without negligence, carelessness or fault on his part, fell therein, and was instantly killed, states a cause of action.—*Holt v. Spokane & P. Ry. Co.* (Idaho), 35 Pac. 39.

ACTION ON CONTRACT, PLEADING: A contract may be declared on in haec verba, or according to its legal effect, when the former mode is adopted, the instrument incorporated into the complaint must show upon its face in direct terms, and not by implication, all the facts which the pleader would have to allege had he elected to set it forth by averment.—*More v. Elmore County Irrigation Co. Limited* (Idaho), 35 Pac. 171.

CONTRACTS, ALLEGATION, DAMAGES: A plaintiff can not recover damages for the breach of a contract on the part of the defendant, unless plaintiff pleads and proves that he has sustained damages by reason of such breach.—*Morrison v. American Developing & Mining Co.* (Idaho), 47 Pac. 94, cases cited.

SUIT ON JUDGMENT, ALLEGATIONS: Every presumption and intendment of law is in favor of the regularity of judgment of a court of general jurisdiction, and to overcome such presumption, in a suit brought to have such judgment declared void, facts must be alleged and proven wherein the court failed to obtain jurisdiction to render the judgment which is so attacked.—*Ollis et al. v. Orr et al.* (Idaho), 56 Pac. 162.

ALLEGATION THAT INSTRUMENT WAS DULY DELIVERED: An allegation in a complaint that "a recognizance was made and duly delivered" must be held to mean that it was returned to the clerk of the court, as required by law; and such allegation is sufficient.—*People v. Myers*, 1 Idaho 355.

DELIVERY, WHEN MADE AND EXECUTED IN COURT: The contract sued upon is an agreement for the direct payment of money.

Held. That the term "made and executed" as used in the contract sued on, imports a delivery of the contract.—*Elbring v. Mullen et al.* (Idaho), 38 Pac. 405.

TERM "SOLD" INDICATES AND INCLUDES DELIVERY: The cause of action set forth in the complaint is on an indebtedness arising from a sale and delivery of goods. The complaint alleges that defendant became indebted to plaintiffs in the sum of \$235.30 for goods, wares and merchandise which had been sold and delivered to defendant. The words "sold and delivered" as used in the complaint constitute but one act. The word "sold" as there used indicates and includes delivery, just as the words "made and executed" or the word "executed" when used with reference to a written instrument imply delivery in many instances.—*Feldman v. Shea* (Idaho), 59 Pac. 537.

STATEMENT OF LEGAL CONCLUSIONS: Allegations that a "judgment is void," and that an affidavit for publication of summons is "insufficient," are statements, not of fact, but of legal conclusions.—*Ollis v. Orr* (Idaho), 56 Pac. 162.

LEGAL CONCLUSIONS. SUIT ON JUDGMENT: A complaint which attacks a judgment as void, solely upon the ground that the affidavit on which order for publication of summons was made was "insufficient," does not state facts sufficient to constitute a cause of action to have such judgment adjudged void, and such complaint, when unaided by affirmative allegations in the answer, will not support a judgment for the plaintiff.—*Ollis et al. v. Orr et al.* (Idaho), 56 Pac. 163.

PLEADING, ALLEGATION OF FRAUD: A simple allegation of fraud and illegality in the action of a board of commissioners without the statement of any facts constituting the illegality is insufficient.—*Picotte v. Watt*, 2 Idaho, 1154, 31 Pac. 805.

REFORMATION OF CONTRACT, ALLEGATIONS: Allegations in complaint that parties to a mortgage intended that certain land (describing it) should be described in and conveyed by such mortgage, and that the scrivener in drawing the mortgage, omitted, through mistake, the number of the section in which such tract was situated; and prayer for reformation. Held, sufficient to grant reformation.—*Christensen v. Hollingsworth* (Idaho), 53 Pac. 211.

ACTION AGAINST CORPORATION, SUFFICIENCY OF COMPLAINT, ALLEGATION OF CORPORATE EXISTENCE: In a suit against a private corporation, the complaint is fatally defective unless it contains unequivocal

avermment that it is a corporation.—*Miller v. Pine Mining Co.* 2 Idaho, 1206, 31 Pac. 803.

DEFECTIVE COMPLAINT CURED BY ANSWER: A defect in a complaint may be cured by allegation in the answer. *Sullivan, J.* dissenting.—*State ex rel. Anderson v. Thum* (Idaho), 55 Pac. 858.

APPEAL, COMPLAINT NOT STATING CAUSE OF ACTION: On appeal, a judgment in favor of the defendant will not be disturbed where the complaint fails to state a cause of action.—*Ollis et al. v. Orr et al.* (Idaho), 56 Pac. 163.

Complaint examined, and held, to state a cause of action.—*Simpson v. Remington* (Idaho), 59 Pac. 360; *Bray v. Elmore County Irrigation Co.* (Idaho), 44 Pac. 432.

COMPLAINT, CLAIM AGAINST A COUNTY: Where a claim against a county is not allowed for the reason that it is not a charge against the county, and its form and proper presentation is not questioned, it is not necessary for the complaint to allege that the requirements of the statute as to the form of the claim and proper presentation thereof have been complied with.—*Taylor v. Canyon County* (Idaho), 61 Pac. 521.

PLEADING, SUFFICIENCY OF COMPLAINT: In an action to recover a special assessment of taxes, the complaint alleges that the assessment was erroneous; that before paying the same, the defendant was notified in writing that it was illegal and void and that suit would be commenced to recover it. Held, facts sufficient to constitute a cause of action.—*Shoup v. Willis*, 2 Idaho, 108, 6 Pac. 124. Where in an action to recover a special assessment of taxes paid under protest it appears that the tax was levied to pay the interest on certain county bonds; an answer admitting that the bonds had not been negotiated at the time of the action is demurrable.—*Shoup v. Willis*, 2 Idaho, 108, 6 Pac. 124.

FACTS ONLY MUST BE STATED: This means the facts, as contradistinguished from the law, from argument, from hypothesis, and from the evidence of the facts. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged; and he must allege nothing affirmatively which he is not required to prove. Negative allegations, however, are frequently necessary, though they are not to be proved.—*Green v. Palmer*, 15 Cal. 412, 76 Am. Dec. 492. Recovery only can be had upon cause of action set forth in the complaint, Sec. 3112 ante, while re-

moving the distinction as to form of actions, does not permit the recovery upon concurrent and intimate causes of action not pleaded.—*Benedict v. Bray*, 2 Cal. 251, 56 Am. Dec. 332.

Argumentative pleadings are not permissible and all matters of substance constituting an essential element to a cause of action must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to a pleading which show those matters only by inference from the contents.—*Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151. Averments of evidence and argumentative statements are to be disregarded as surplusage, and the complaint is demurrable if the ultimate facts already stated do not constitute a cause of action. — *McCaughy v. Schuette*, 117 Cal. 223, 48 Pac. 1088, 59 Am. St. Rep. 176.

Where a written agreement is set out in full in a pleading, the meaning of words or abbreviations therein need not be pleaded, but may be proven on the trial, for the purpose of enabling the court to interpret the words.—*Berry v. Kowalsky*, 95 Cal. 134, 30 Pac. 202, 29 Am. St. Rep. 101.

The character and effect of an averment that may be uncertain in one of its causes is not limited to a construction of that clause merely, but is to be considered in connection with the entire complaint.—*Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 29 Am. St. Rep. 133. A complaint, otherwise indefinite and defective, may be aided by facts of which the courts may take judicial notice, and thus sustained as against a general demurrer.—*De Baker v. Railway Co.* 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237.

Prayer of complaint cannot aid in making out a case otherwise defectively stated, but it may serve to show what kind of a case the plaintiff supposes he has made, and the kind of relief to which he conceives himself to be entitled, and indicate the object he seeks to accomplish.—*Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722.

COMMON COUNTS: A complaint which avers substantially that the defendant was at a certain time indebted to the plaintiff in a certain sum for services rendered at the special instance and request of the defendant, is sufficient without stating in terms the values of the services or that the defendant promised to pay. The promise to pay alleged in the common count in assumptionit, was a mere conclusion of law from the facts stated, and need not be averred under the Code, which requires facts only to be stated,—*Wil-*

kins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64.

PARTICULAR ALLEGATIONS IN COMPLAINT: A general allegation of the due performance of a condition precedent in a contract is sufficient without stating the facts showing such performance. Sec. 3228, and note thereunder.

PLAINTIFF'S CAPACITY TO SUE: The allegation that plaintiff is a corporation under the laws of the state, is sufficient to establish the legal capacity to sue.—*Cal. Steam Nav. Co. v. Wright*, 6 Cal. 259, 65 Am. Dec. 511.

And an averment of the existence of a de facto corporation is as issuable a fact as an averment of the existence of a corporation de jure.—*Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151.

In pleading the facts showing the capacity of an administrator to sue, it is sufficient to aver his appointment under a petition for letters, by an order of the court duly given and made, and his qualifications and the issuance of letters, without averring the facts giving jurisdiction to the probate court.—*Munro v. Pacific Coast Dredging and Reclamation Co.* 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248.

ALLEGATION OF NON - PAY - MENT: In action upon promissory note, allegation that a certain sum is "due, owing and payable" thereon is sufficient.—*Howard v. Richards*, 2 Nev. 128, 90 Am. Dec. 520. So in action to recover money due on contract, an allegation that defendant has failed, refused and neglected to pay, is sufficient allegation of non-payment, when tested by general demurrer.—*O'Hanlon v. Denvir*, 81 Cal. 60, 22 Pac. 407, 15 Am. St. Rep. 19.

CONTRIBUTORY NEGLIGENCE: In an action for negligence, the plaintiff need not allege that the injury was done without fault of the plaintiff. Contributory negligence is purely a matter of defense, which a plaintiff is not bound to negative in his complaint.—*Magee v. N. P. C. R. R. Co.* 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69 and note.

DAMAGES, SPECIAL: Only such damages as necessarily accrue from or can be traced to the injuries complained of can be recovered, unless specifically alleged.—*Williams v. O. S. L. R. R.* 18 Utah, 210, 54 Pac. 991, 72 Am. St. Rep. 777; *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107. But damages which are the necessary result of the injury need not be specially pleaded.—*Treadwell v. Whittier*, 85 Cal. 575, 22 Pac. 266, 13 Am. St. Rep. 175. Separate averment of the ele-

ments of general damages not necessary.—*Fox v. Oakland Con. St. Ry.* 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216.

COMPLAINTS IN PARTICULAR ACTIONS: A complaint in an action for the specific performance of a contract for the sale of land need not allege the non-existence of a complete or adequate remedy at law in damages, nor that the vendor was the owner at the date of filing the complaint.—*Ide v. Leister*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17.

A complaint in partition is good which is silent upon the subject of the mode of partition and a general allegation that "the premises cannot be divided by metes and bounds without prejudice" is sufficient.—*De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81.

Complaint in ejectment must allege seisin, possession, or right of possession by direct averments.—*McCaughey v. Schuette*, 117 Cal. 223, 48 Pac. 1088, 59 Am. St. Rep. 176, and the allegation of possession, at the time the ouster is complained of, is sufficient allegation of title to sustain the declaration.—*Hutchinson v. Perley*, 4 Cal. 33, 60 Am. Dec. 578.

ACTION OF DIVORCE, ADULTERY: The charge of adultery should be stated with reasonable certainty as to time and place, so as to enable the defendant to prepare to meet it on the trial.—*Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717.

ACTION ON PROMISSORY NOTE IN HANDS OF DEFENDANT: Plaintiff may prove that note sued on was in the possession of the defendant at the time of the trial, without alleging that

fact in his complaint.—*McClusky v. Gerhauser*, 2 Nev. 47, 90 Am. Dec. 512. In an action on a lost note a tender of indemnity and allegation of the same is not absolutely necessary. A failure to so tender indemnity only affects the question of costs.—*Randolph v. Harris*, 28 Cal. 561, 87 Am. Dec. 139.

In an action to recover damages for the loss of a draft, a complaint which does not state the date of the draft, the amount for which it was drawn, the time when it was payable, or to whom payable is insufficient.—*Zeigler v. Wells Fargo & Co.* 23 Cal. 179, 83 Am. Dec. 87.

Attorneys, action against for negligence, averment of retainer, sufficiency of.—*Cavillaud v. Yale*, 3 Cal. 108, 58 Am. Dec. 388.

LIBEL AND SLANDER, COVERT MEANING OF WORDS: When a slander or libel is couched in language having a covert meaning not apparent upon its face, or in words or phrases not used otherwise than as slang, or cant terms, it is necessary for a plaintiff not only to allege and prove the slanderous or libelous sense in which the words were used by the defendant, but also that they were understood in the same sense by those to whom they were addressed; but where the words are in general use they will be understood by the court in the same sense in which they are usually understood by the masses of men, and no allegation or proof of such meaning is necessary.—*Edwards v. San Jose Printing and Publishing Society*, 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Section 3205. What Causes of Action May be Joined: The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

1. Contracts, express or implied;
2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same;
3. Claims to recover specific personal property, with or without damages for the withholding thereof;
4. Claims against a trustee by virtue of a contract, or by operation of law;
5. Injuries to character;
6. Injuries to person;
7. Injuries to property.

The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to the character or to the person.

1887 R. S. Sec. 4169.

Where actions might have been joined the court may order them consolidated: Sec. 3741.

Successive actions may be brought when arising subsequently on same contract or transaction: Sec. 3740.

COMPLAINT, JOINDER, COUNTS: Under Code of Civil Procedure 3225, providing "that it is not necessary for a party to set forth in a pleading the items of an account therein alleged," in an action for the balance of an account, all the common counts may be united in one count as one cause of action, without any specification of the sums due upon each.—*Mills v. Glennon*, 2 Idaho, 95, 6 Pac. 116.

MORTGAGE REFORMATION, FORECLOSURE: A complaint containing all the necessary averments for foreclosure of mortgage, and for reformation of certificate of acknowledgment to such mortgage states but one cause of action.—*Vermont Loan & Trust Co. v. McGregor et al.* (Idaho), 51 Pac. 103; *Hutchinson v. Ainsworth*, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823

ACTION FOR DEED AGAINST SHERIFF AND ADVERSE CLAIMANT: A complaint in a suit brought to obtain a deed to property sold under execution, and to determine the plaintiff's right to such deed as against the sheriff and an adverse claimant, states only one cause of action.—*Brady v. Linehan* (Idaho), 51 Pac. 761.

LEGAL AND EQUITABLE RELIEF: Legal and equitable relief may be sought in the same action, and by the same complaint, but the grounds therefor must be distinctly and separately stated.—*Wa Ching et al. v. Constantine*, 1 Idaho, 266.

MANNER OF STATEMENT: When several causes of action are united, under the provisions of this section, it is not necessary to re-write in each count after the first all common allegations, but it is sufficient if apt and express reference is made in each subsequent count to the preliminary allegation stated in the first, thus making them a

part thereof.—*Aulbach v. Dahler et al.* (Idaho), 43 Pac. 322, cases cited.

SAME CAUSE UNDER DIFFERENT FORMS: The rule under the Code allows a party to state as many causes of action as he may have, if they are of a character to be properly combined in the same complaint, but it does not permit a party to set out the same causes under different forms.—*People v. Slocum et al.* 1 Idaho, 62.

DAMAGES, SEVERAL CLAIMS UNITED: In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam, and the consequent washing away of the pay-dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim.—*Fraser v. Sears Union Water Co.* 12 Cal. 556, 73 Am. Dec. 562.

A claim to enforce an express or implied trust may be joined in a complaint with a claim to enforce a vendor's lien existing without any written contract.—*Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142.

Causes of action in tort may be united with causes of action on contract, and litigated in the same action if both arise from and constitute part of the same transaction.—*Jones v. Steamship Cortes*, 17 Cal. 487, 79 Am. Dec. 142.

SPLITTING CAUSE OF ACTION. INJURY TO SEVERAL PARCELS FORMS SINGLE TORT: In cases of tort, the question as to the number of causes of action which the same person may have turns upon the number of torts, and not upon the number of different pieces of property which may have been injured thereby. Each separate tort gives a separate cause of action, and but a single one, and whenever by one act a permanent injury is done to several pieces of property, the damages are assessed once for all, and the cause of action is wholly merged in a recovery of damages for injury to one of the parcels.—*Beronio v. S. P. R. Co.* 86 Cal. 415, 24 Pac. 1093, 21 Am. St. Rep. 57.

DEMURRER TO THE COMPLAINT.

Section 3206. When Defendant May Demur: The defendant may demur to the complaint within the time required in the summons to answer, when it appears on the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant or the subject of the action; or,
2. That the plaintiff has not legal capacity to sue; or,
3. That there is another action pending between the same parties for the same cause; or,

4. That there is a defect or misjoinder of parties, plaintiff or defendant; or,
5. That several causes of action have been improperly united; or,
6. That the complaint does not state facts sufficient to constitute a cause of action; or,
7. That the complaint is ambiguous, unintelligible or uncertain.

1887 R. S. Sec. 4174.

General and special demurrer: Sec. 3207.

Demurring and answering at same time: Secs. 3207 and 3215.

Demurrer is an appearance: Sec. 3714.

Objections waived by not demurring: Sec. 3210.

Enlargement of time to file demurrer: Sec. 3241.

Must be filed with clerk and served on attorney: Sec. 3236.

Statute of limitations, how pleaded: Sec. 3229.

Mandamus, answer raising law question, nature of, proceedings on: Sec. 3778.

Judgment on demurrer: Sec. 3486.

EQUITABLE ACTIONS, NON-JOINDER: In equitable actions the plaintiff should bring before the court all parties interested in and connected with the subject-matter so that the question involved and pertaining to the subject-matter may be fully and forever settled.—*Beane v. Givens* (Idaho), 51 Pac. 987.

NON-JOINDER, WIFE A PARTY: When B brings suit on four causes of action, three being for personal services and the fourth for the purpose of having a chattel mortgage executed by himself and wife on the separate property of the wife, declared fraudulent and void, and fails to make his wife a party, the demurrer on the ground of misjoinder or non-joinder of parties should have been sustained.—*Beane v. Givens* (Idaho), 51 Pac. 987.

NON-JOINDER, ACTION CONCERNING WATER RIGHTS: In an action concerning water rights, when it does not appear from the complaint that the subject of litigation is within any water district, or that there is any water master in charge of the water in question, a demurrer based upon the non-joinder of the water master is not well taken. — *Boulware v. Parke*, (Idaho), 43 Pac. 680.

Non-joinder, action on bond sureties. See *State v. McDonald* (Idaho), 40 Pac. 312.

GENERAL DEMURRER, ESSENTIAL FACT NOT STATED: Where the complaint fails to set forth a material fact essential to the establishment of plaintiff's right to recover, the complaint is bad on general demurrer.—

Bingham County v. Woodin (Idaho), 55 Pac. 661.

GENERAL DEMURRER, SEVERAL CAUSES OF ACTION: When the complaint states a good cause of action, although joined with a cause of action that is demurrable, a general demurrer that the complaint does not state facts sufficient to constitute a cause of action will not lie.—*Carter v. Wann* (Idaho), 57 Pac. 314.

GENERAL DEMURRER, USURIOUS CONTRACTS: When the complaint shows that the cause of action is based upon a usurious contract, the principal of which has been fully paid, a general demurrer to such complaint should be sustained.—*Stevens v. Home Saving & Loan Ass'n* (Idaho), 51 Pac. 779. (For opinion on rehearing see 51 Pac. 986.)

AMBIGUITY AND UNCERTAINTY: Ambiguity and uncertainty in a complaint which states a cause of action, but not with that certainty contemplated by the Code, cannot be reached by an objection to the introduction of evidence under the complaint, but only by special demurrer, pointing out the ambiguity and uncertainty complained of by the defendant.—*Naylor v. Vermont Loan & Trust Co.* (Idaho), 55 Pac. 297.

UNCERTAINTY, SPECIAL DEMURRER: Defects in pleadings which make them uncertain are special grounds for demurrer under our Code which cannot be taken advantage of under general demurrer.—*Palmer v. Utah Northern Railway Co.* 2 Idaho, 290, 13 Pac. 425.

This section cited in *Lawson v. Genesee Farmers' Alliance Joint Stock Co.* (Idaho), 43 Pac. 191.

CONSTITUTIONALITY, ENACTMENT OF STATUTE, QUESTION: Where the constitutionality of the enactment of a statute is put in question by demurrer, it is imperative that the trial court should be furnished with a copy of the legislative journals certified by the secretary of state, and a stipulation of attorneys as to such journals will be disregarded.—*State v. Boise* (Idaho), 51 Pac. 110.

MISJOINDER OF PARTIES: A complaint stating a cause of action against the defendant personally and also against him as an executor or administrator, no joint liability being

shown, is demurrable for misjoinder of parties defendant.—*Schlicker v. Hemmenway*, 110 Cal. 579, 42 Pac. 1063, 52 Am. St. Rep. 116.

UNCERTAINTY: A complaint stating the maintenance of dangerous and negligent conditions of sidewalks by defendant at a certain date and alleg-

ing that the injury complained of occurred to plaintiff at a subsequent date, is subject to a demurrer for uncertainty in not specifically alleging the existence of such condition at the time of the injury.—*Cotter v. Lindgren*, 196 Cal. 602, 39 Pac. 950, 46 Am. St. Rep. 255.

Section 3207. Specification of Grounds, Extent of Demurrer: The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so it may be disregarded. It may be taken to the whole complaint or to any of the causes of action stated therein, or the defendant may demur and answer at the same time.

1887 R. S. Sec. 4175.

SEVERAL CAUSES OF ACTION, GENERAL DEMURRER: When the complaint states a good cause of action, although joined with a cause of action that is demurrable, a general demurrer that the complaint does not state facts sufficient to constitute a cause of action, will not lie.—*Carter v. Wann et al.* (Idaho), 57 Pac. 314.

DEMURRER, AMENDMENT: A demurrer may be amended, but leave to do so must first be obtained.—*Dunbar v. Board of Com'rs of Canyon County* (Idaho), 49 Pac. 409.

The prayer of a complaint is not subject to demurrer.—*Althof v. Conheim*, 38 Cal. 230, 99 Am. Dec. 363.

SUFFICIENCY OF FORM: A demurrer to a complaint upon the ground of a misjoinder of parties which designates the defendants who are improperly joined with the demurring party, sufficiently calls the plaintiff's attention to the objection to the complaint and is sufficient in form. It is not necessary to incorporate into the demurrer an argument in support thereof, or to state therein the reasons why the misjoinder is improper.—*Gardner v. Samuels*, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135. If all the parties interested

in the demand, when there has been an assignment of a part of it, are not made parties to the action, the objection, under the Code, to the complaint, is not that it lacks facts, but that it lacks parties, and will be waived unless the complaint is demurred to on that ground.—*Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423.

The objection that there is a defect of parties to the complaint must be taken by demurrer or answer, or it will be deemed to have been waived, but the defendant may object on the trial, if the proof does not sustain plaintiff's allegations, as to his right of action.—*Alvarez v. Brannan*, 7 Cal. 504, 68 Am. Dec. 274.

The objection, that there is a non-joinder of parties cannot be taken advantage of on appeal after judgment, but should be taken advantage of on demurrer.—*Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125.

Where a demurrer is overruled for want of presentation, upon an appeal by the plaintiff from a judgment for the defendant, the respondent cannot urge any special ground of demurrer.—*Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 29 Am. St. Rep. 133.

Section 3208. Proceedings When Complaint is Amended: If the complaint is amended, a copy of the amendments must be filed or the court may, in its discretion, require the complaint, as amended, to be filed; and a copy of the amendments or amended complaint, must be served upon the defendants affected thereby. The defendant must answer the amendment or the complaint as amended, within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases.

1887 R. S. Sec. 4176.

Amendments, generally: Secs. 3240 and 3241.

SUBSEQUENT PROCEEDINGS BASED ON AMENDED COMPLAINT: When an amended complaint is filed it

takes the place of the original, and all subsequent proceedings in the case are based upon the amended pleading.—*People ex rel. Huston v. Hunt*, 1 Idaho, 433.

NEW MATERIAL, FACTS ALLEGED, SERVICE REQUIRED: When the plaintiff files an amended complaint in which material facts, which were not alleged in the original complaint, are alleged, the amended complaint must be served upon all the defendants against whom judgment is sought upon such amended complaint.—*Vermont Loan & Trust Co. v. McGregor et al. (Idaho)*, 51 Pac. 104.

WHEN SERVICE NOT REQUIRED: An amendment to a complaint, not in the matter of substance, and unnecessary to be made, is not required to be served upon defendant.—*Curtis et al. v. Bunnell & Eno Inv. Co. et al. (Idaho)*, 55 Pac. 659.

UPON WHAT DEFENDANTS SERVED: Where complaint is amended by asking reformation of certificate of acknowledgment, the service of the amended complaint is not required to be made on defendants who are in default for want of an answer, and who are not parties to the mortgage.—*Ver-*

mont Loan & Trust Co. v. McGregor et al. (Idaho), 51 Pac. 103.

DEFENDANTS NOT AFFECTED, SERVICE UNNECESSARY: Section 4176, Rev. St., provides for the service of amended complaint on all the "defendants affected thereby," and none other.—*Vermont Loan & Trust Co. v. McGregor et al. (Idaho)*, 51 Pac. 103.

RES JUDICATA: A judgment against plaintiff upon demurrer does not preclude him from subsequently asserting the same facts accompanied by additional allegations which complete the statement of a cause of action or of a defense defectively stated in the former action or proceeding. Nor does the decision against the plaintiff on demurrer, on the ground that the remedy he seeks is not a proper one upon the facts charged, estop him from maintaining another and different action which those facts are adequate to support.—*Kleinschmidt v. Binzel*, 14 Mont. 31, 35 Pac. 460, 43 Am. St. Rep. 604.

Section 3209. Objection not Appearing on Complaint Taken by Answer: When any of the matters enumerated in section 3206 do not appear upon the face of the complaint, the objection may be taken by answer.

1887 R. S. Sec. 4177.

Section 3210. Objections, When Deemed Waived: If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

1887 R. S. Sec. 4178.

AVERMENT OF INCORPORATIONS: Without averment of incorporation the complaint does not state facts sufficient to constitute a cause of action, and this defect is never waived.—*Miller v. Pine Mining Co.* 2 Idaho, 1206, 31 Pac. 803.

OBJECTION TO PARTIES AND MISJOINDER OF CAUSES: Objections to a complaint that "the action is not brought in the name of the real parties in interest, as is shown by the face of the complaint, that the plaintiff has not legal capacity to sue in this action, that several causes of action have been improperly united, and that the complaint is ambiguous, unintelligible, and uncertain," must be taken by demurrer or answer, and when not so taken will be deemed to be waived.—*Carter v. Wann et al. (Idaho)*, 57 Pac. 214.

AMBIGUITY AND UNCERTAINTY: A defendant waives all the rights he may have, on the ground that a complaint is ambiguous, unintelligible, or

uncertain, by failure to demur to such complaint.—*Aulbach v. Dahler et al. (Idaho)*, 43 Pac. 322.

OBJECTIONS NOT WAIVED: The objection that a complaint does not state facts sufficient to constitute a cause of action is never waived.—*Greathouse v. Heed*, 1 Idaho, 482.

EFFECT OF ANSWER: An answer by a party, without the overruling of his demurrer, waives all defects in the complaint, except those which may properly be taken advantage of on a motion in arrest of judgment.—*Pence v. Durbin*, 1 Idaho, 550.

OBJECTION TO RIGHT TO FILE PLEADING, DEMURRER WAIVED: After a defendant has demurred to a bill of review, he cannot raise an objection to the right of the plaintiff to file it. To avail himself of such objection, he should move the court on his first appearance to strike the bill from the files or to dismiss the suit.—*Hyde v. Lamberson et al.* 1 Idaho, 539.

EXCEPTIONS, ORDER SUSTAINING DEMURRER: An exception

deemed to have been taken to an order sustaining a demurrer should have been settled in a bill of exceptions and brought to the supreme court. When it is not done, this court will not consider it.—*Berry v. Alturas County*, 2 Idaho, 274, 13 Pac. 233.

DISMISSAL OF APPEAL, RECORD, FINAL JUDGMENT: Where the record on appeal fails to show a final order or judgment from which an appeal could be taken, the appeal will be dismissed.—*Adams v. McPherson*, 2 Idaho, 855, 27 Pac. 577.

SAME: An order sustaining a demurrer and dismissing an action is not an appealable order, and unless final judgment is rendered, the appeal will be dismissed.—*Ah Kle v. McLean*, 2 Idaho, 812, 26 Pac. 937.

DEMURRER, INTERPOSITION OF ON APPEAL: Where defendant in a trial court questions the sufficiency of the complaint by demurrer, and the demurrer is overruled, and the wording is not saved by bill of exception, another demurrer raising the same question cannot be interposed on appeal.—*Guthrie v. Fisher*, 2 Idaho, 101, 6 Pac. 111.

AIDER BY JUDGMENT: Objection to complaint should be raised by such demurrer in the trial court, otherwise objection is waived and complaint will be held, sufficient after judgment in appellate court.—*Jacobson v. Bunker Hill & Sullivan Mining Co.* 2 Idaho, 863, 28 Pac. 396.

APPELLATE COURT, NO RIGHT OF RECOVERY SHOWN, OBJEC-

TIONS TO: Where a party shows no right to recover, objections to the complaint or other pleadings may be taken for the first time in the appellate court and where a party shows no right to recover under any possible state of proof, the court is not bound to submit the case to the jury.—*Gorman v. Commissioners of Boise County*, 1 Idaho, 655.

LACHES, DEFECTIVE COMPLAINT: No laches is imputable to the defendant for not interposing objections to the complaint at the first opportunity, when it appears that the plaintiff is not entitled to recover.—*Gorman v. Commissioners of Boise County*, 1 Idaho, 655.

WAIVER OF MISJOINDER: Where the parties against whom damages are sought for the trespass have not pleaded a misjoinder of cause of action against them, and against the principal debtor for contribution, and merely insist that there is no right of action against them, the objection to the misjoinder of causes is waived, and a recovery may be had against them for the trespass.—*March v. Barnet*, 121 Cal. 419, 53 Pac. 933, 66 Am. St. Rep. 44.

When a complaint states a cause of that the allegations are indefinite, or uncertain, or ambiguous, cannot avail the objector after judgment, if the objection was not made, in the proper way, before judgment.—*Maynard v. Locomotive Engineers, etc., Insurance Association*, 16 Utah, 145, 51 Pac. 259, 67 Am. S. Rep. 602.

THE ANSWER.

Section 3211. Answer, What to Contain: The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant;
2. A statement of any new matter constituting a defense or counter claim. If the complaint be verified, the denial of each allegation controverted must be specified, and be made positively or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified a general denial is sufficient, but only puts in issue the material allegations of the complaint.

1887 R. S. Sec. 4183.

ANSWER: Must be filed with clerk and served on attorney or party: Sec. 3236.

Enlargement of time to file: Sec. 3241.

To be verified if complaint verified: Sec. 3219.

Construction of: Sec. 3222,

Allegations in, what are material: Sec. 3235.

Irrelevant, striking out: Sec. 3224.

Redundant matter, striking out: Sec. 3224.

Account, items of need not be set out: Sec. 3225.

Account, demanding items of. Sec. 3225.

Conditions precedent, pleading: Sec. 3228.

Statute, private, pleading: Sec. 3230.
Statute of limitations, how pleaded: Sec. 3229.

Judgment, pleading: Sec. 3227.

Disclaimer in actions concerning real property: Sec. 3380.

Counter claims: Secs. 3212, 3215.

Cross-complaint: Sec. 3216.

Separate defendants, having separate defenses, defendants prevailing entitled to costs: Sec. 3724.

Intervention, answer in: Sec. 3177.

Supplemental answer, facts arising after former answer: Sec. 3235.

After default without personal service, answer on merits: Sec. 3241.

Joint debtors, answer, proceedings after judgment: Sec. 3701.

Slander and libel actions: Sec. 3232.

Mandamus, verification required: Sec. 3773.

Issues raised by: Secs. 3774, 5775.

Partition suits, requirements in: Sec. 3400.

Water rights, summary proceedings: Sec. 3794.

Amendments: Secs. 3240, 3241.

DEFENSE, CAUSE OF ACTION, DEFINITION: A defense to an action or cause of action in the popular sense of the Code is a right possessed by the defendant arising out of the facts alleged in his pleadings, which either paritally or wholly defeats the plaintiff's claim.—*Utah & N. R. Co. v. Crawford*, 1 Idaho, 770.

ANSWER, GENERAL AND SPECIFIC DENIALS: Under our practice generally where a complaint is not verified a general denial by the defendant puts in issue the substantial allegations of the complaint.—*United States v. Alexander*, 2 Idaho, 354, 17 Pac. 746. But where suit is upon written instrument, see Sec. 3222 post.

REPLEVIN, PLEADINGS, EVIDENCE: Under general denial in replevin defendants may prove fraud in the sale to plaintiff.—*Cornwall v. Mix* (Idaho), 34 Pac. 893. See also same case generally, proof admitted under general denial in replevin.

Admission by failure to deny. See *Lillienthal & Co. v. Anderson*, 1 Idaho, 673. Also Sec. 3233 post.

DENIAL OF INDEBTEDNESS, CONCLUSION OF LAW: The denial of indebtedness without denial of the facts alleged in the complaint out of which such indebtedness arose or follows, is a conclusion of law and raises no issue of fact.—*Swanholm v. Reeser* 2 Idaho, 1167, 31 Pac. 804.

ACTION AGAINST SURETIES,

SUFFICIENCY OF ANSWER: Where in an action against the sureties on an undertaking in attachment, the answer alleges that the action on which the undertaking was given was prematurely brought, a motion to strike out such answer as not constituting a defense was properly granted.—*Guthrie v. Fisher*, 2 Idaho, 101, 6 Pac. 111.

ISSUE SUFFICIENCY OF ANSWER TO RAISE: Where, in an action to recover damages alleged to have been sustained by diversion of water from plaintiff's premises, the answer denies any diversion or injury, plaintiff's contention on appeal that the answer did not raise any issue between the parties will not be sustained.—*Jones v. St. John Irrigating Co.* 2 Idaho, 58, 3 Pac. 1.

REQUIRED TO PLEAD ALL DEFENSES: Under the Code of procedure a defendant is not only permitted, but is required to set up all matters of defense, by answer in the original action, whether such matters are legal or equitable in their character.—*Utah & N. R. Co. v. Crawford*, 1 Idaho, 770.

ACTION ON NOTE, PLEA OF PAYMENT, SUFFICIENCY: Where the action admits the making of the note sued on, and alleges by sufficient averments that a mortgage was given to secure said note, and to further secure the same, that the maker entered into an agreement to give the holder of the note and the mortgagee possession of a valuable property, with authority to collect the rents, to keep said property insured, and in case of loss by fire, to collect the insurance, and pay first all taxes, premiums on insurance, and then the note and interest thereon; that they took possession thereof and collected the rents; that the property was consumed by fire, and that plaintiff and mortgagees collected said insurance; that the amount so collected far exceeded all demands; and that said note was fully paid from said funds. The said answer sets up a complete plea of payment and set-off and proof thereof should be permitted.—*First National Bank v. Bews*, 2 Idaho, 1175, 31 Pac. 816.

NEW MATTER DEEMED CONTROVERTED: Under the provisions of section 3233, when new matter is pleaded in the answer in avoidance or as constituting a defense or counterclaim, such new matter is deemed denied or controverted by the plaintiff. Rehearing denied.—*Alsbaugh v. Reid* (Idaho), 55 Pac. 300.

NECESSITY OF VERIFICATION: A complaint by a public officer in his official capacity need not be verified,

but the answer to it must be verified unless it also be by a public officer in his official capacity. But if the complaint be not in fact verified, a general, and not specific verified answer may put in issue the main allegations of the complaint under Section 4183 of the Revised Statutes.—*United States v. Shoup*, 2 Idaho, 459, 21 Pac. 656.

DENIAL UPON INFORMATION AND BELIEF: A denial of an answer of the material averments of the complaint, upon information and belief, is sufficient to raise an issue to be tried, if the facts are not within the personal knowledge of the answering defendant.—*People v. Curtis*, 1 Idaho, 753.

SAME, OF PUBLIC RECORD INSUFFICIENT: A denial, on information and belief, of matters of public pledge, a plea of a previous tender of record is not sufficient.—*Simpson v. Remington*, (Idaho), 59 Pac. 360.

SAME, COURT FILES AND RECORDS: Denial upon information and belief matters entirely made up of records in a case in which the defendant was a party, insufficient.—*First Nat. Bank of Moscow v. Martin* (Idaho), 55 Pac. 302.

ANSWER AS EVIDENCE: Verified answer is a sworn admission of defendant and admissible in evidence.—*Pence v. Sweeney*, 2 Idaho, 914, 28 Pac. 413. This is true even if answer stricken out on defendant's motion.—*Bloomingtondale v. Durell*, Idaho, 33.

SPECIAL DEFENSES, PLEADING STATUTE OF ANOTHER STATE: One relying upon a statute of a state under which a contract was made, as a defense against its enforcement, should set out, at least substantially the statute on which he relies. The law must be averred and proved in the same manner as any other fact. A mere averment of the legal effect of such a statute is insufficient.—*Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461.

THE STATUTE OF FRAUDS IS NOT WAIVED BECAUSE NOT SPECIALLY PLEADED: It is sufficient for the defendant to deny the alleged agreement without making any reference to the statute. The agreement being denied, the plaintiff must produce legal evidence of its existence.—*Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 12 Am. St. Rep. 162, and note. But see note, 86 Am. Dec. 684, and when the defect appears from complaint affirmatively it may be taken advantage of on demurrer.—*Barr v. Connell*, 76 Cal. 469, 18 Pac. 429, 9 Am. St. Rep. 242.

DURESS, EXECUTION OF TRUST: If a trust is executed by a deed made

in pursuance thereof, the execution of which is admitted, it cannot be proved that it was made under duress, unless the duress is specially pleaded as affirmative matter in avoidance of the deed.—*Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268.

WANT OF CONSIDERATION, FRAUD: In defense to an action on a promissory note it is not sufficient to plead in general terms want of consideration and that the note was obtained by fraud. The answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud.

It is not a good plea to allege that a note sued on is the property of another, and not of the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, and which could not be set up against the plaintiff.—*Gushee v. Leavitt*, 5 Cal. 160, 63 Am. Dec. 116.

Fraud, discovery. Sufficiency of averments generally.—*Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219.

PLEAS IN ABATEMENT, FORMER SUIT PENDING: If a party pleads a former suit pending, in abatement of second suit, he must allege clearly that the cause of action of the first is identical with that of the second suit; otherwise his plea is insufficient.—*Beardsley v. Morrison*, 18 Utah, 478, 56 Pac. 303.

TENDER: In an action to enforce a pledge, a plea of a previous tender of the indebtedness is good without bringing the money into court.—*Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 5 Am. St. Rep. 435.

EQUITABLE ESTOPPELS IN PAIS: The party relying upon an equitable estoppel in pais in an action at law, must inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet, and to do this he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits in equity, but where evidence of the facts constituting it is introduced without objection, the defect in the pleading will be considered waived.—*Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157.

SUFFICIENCY OF DENIALS: Where the pleadings are verified and the complaint contains an allegation that the note in suit was assigned by the payee to the plaintiff for a valuable consideration by an instrument in writing, the fact of the assignment is not put in issue by a denial that the assignment was in writing and for a valuable consideration.—*Randolph v. Harris*, 28 Cal. 561, 87 Am. Dec. 139.

Where the complaint alleges judgment, issuance of execution and sale thereunder of land, and the answer denies the validity of the judgment and that the plaintiff acquired any title by the pretended sale, the execution and sale are not sufficiently denied to require the execution to be put in evidence.—*Lee v. Figg*, 37 Cal. 328, 99 Am. Dec. 271.

Where a complaint in a foreclosure suit alleges that the defendants did "execute under their hands and seals and deliver" the mortgage, an answer of one of the defendants denying that she executed the mortgage referred to is sufficient to put in issue the fact of the delivery and every other fact necessary to its execution, although there is no specific denial of the delivery alleged.—*Mesanger v. Hamilton*, 101 Cal. 532, 35 Pac. 1054, 40 Am. St. Rep. 81.

DENIALS OF VERIFIED PLEADINGS: A general denial in an answer containing specific denials raises no issue against a verified complaint.—*Delano v. Jacoby*, 96 Cal. 275, 31 Pac. 290, 31 Am. St. Rep. 201.

DENIALS ON INFORMATION AND BELIEF, SUFFICIENCY OF: Where the alleged fact is, from its nature, presumptively within the personal knowledge of the defendant, he can not be permitted to answer on information and belief, but must answer in the positive form. And where, from the nature of the fact alleged, the knowledge, if any, is presumptively based on information, he is not bound to deny positively, but only "according to his information and belief," but in such cases he must answer according to both his information and belief. The word "belief," as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant, drawn from information.—*Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621.

A denial stating, with respect to a specified allegation of the complaint, that the defendant has "no knowledge or information upon which to found a belief, and therefore denies the same," is insufficient to form an issue.—*State*

v. Butte City Water Co. 18 Mont. 199, 44 Pac. 966, 56 Am. St. Rep. 574.

But a denial to a specific averment in a complaint alleging that the defendant has no information or belief sufficient to enable him to answer the allegations of a particular paragraph of the complaint, which contains such specific averment, and for that reason denying all and singular the allegations contained in such paragraph, is sufficient to raise an issue as to the specific facts set forth.—*Read v. Buffum*, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131. A denial upon information and belief of facts peculiarly within the knowledge of the defendant is unavailing. Therefore, if it is the duty of a defendant, in his official capacity to know whether or not an allegation is true he will not be permitted to put it in issue by a denial under information and belief.—*McConoughey v. Jackson*, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53.

DEFENSES GENERALLY: Under the Code there are only two classes of defenses allowed. The first consists of a simple denial; and the second, of the allegation of new affirmative matter, and as the Code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defense, these two classes of defense must be the same in all cases. The intention of the Code is to adopt the true and just rule that the defendant must either deny the facts as alleged or confess and avoid them.

NEW MATTER: New matter is that which, under the rules of evidence, the defendant must affirmatively establish. A defense that concedes that plaintiff once had a good cause of action, but insists that it no longer exists, involves new matter and the Code makes no distinction between different classes of new matter. All new matter of defense must be stated in the answer.—*Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692. The release of a surety by discharge of the principal is a new matter and must be pleaded.—*Bull v. Coe*, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235.

Section 3212. When Counter Claim to be Set Up:

The counter claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;
2. In an action arising upon contract; any other cause of action

arising also upon contract and existing at the commencement of the action.

1887 R. S. Sec. 4184.

Answer, set-offs, permanent improvements put upon land by party claiming under color of title may be set off against damages recoverable in action for possession: Sec. 3377.

Answer, counter claim, debtor sued by assignee of insolvent estate can not set off claims purchased after filing petition or not provable against the estate: Sec. 3925.

Effect of assignment of cause of action upon set-off and other defenses. Sec. 3156.

Dismissing action where counter claim set up: Sec. 3199.

Cross-demands deemed compensated: Sec. 3214.

SET-OFF AND COUNTER CLAIMS, WHEN ALLOWABLE, JOINT DEBTS: Counter claims alleging a debt due defendant and a former partner or stranger to the suit, held to be bad and the demurrer thereto properly sustained.

PLEADINGS, SUFFICIENCY: A counter claim which fails to allege that the debt existed at the commencement of the action but alleged that it is now due, held to be bad, and the demurrer thereto properly sustained.—*McGuire v. Lamb*, 2 Idaho, 346, 17 Pac. 749.

FAILURE TO PLEAD BARS ANOTHER SUIT: A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected therewith, in favor of the defendant, must be set forth in the answer as a counter claim, and cannot be made the basis of another suit brought by the defendant against the plaintiff in the former suit.—*Stevens v. Home Savings & Loan Co.* (Idaho), 51 Pac. 779. (For opinion on rehearing, see 51 Pac. 986).

STATUTORY PENALTY, FAILURE TO DISCHARGE MORTGAGE: Where a mortgagor sues to recover a statutory penalty for the failure of the mortgagee to discharge the mortgage of record after its satisfaction, the mortgagee should set up any rights under the mortgage by way of counter claim.—*Stevens v. Home Savings & Loan Ass'n* (Idaho), 51 Pac. 986. (On rehearing.)

MORTGAGE FORECLOSURE, COUNTER CLAIM FOR MONEY DUE: In an action by the mortgagee to foreclose his mortgage, the mortgagor may, in his answer, set forth a counter claim for purchase money due him from the mortgagee on bargain and sale of realty; and it is reversible error to sustain a demurrer to such counter

claim on the ground that there is "no relation or connection between the subject matter set out in plaintiff's complaint and the said counter claim."—*Miller v. Hunt et al.* (Idaho), 57 Pacific, 315.

DEMURRER TO COUNTER CLAIM, APPEAL: An order sustaining a demurrer to a counter claim set forth in an answer, may be reviewed on an appeal taken from final judgment in the action by the defendant.—*Miller v. Hunt et al.* (Idaho), 57 Pacific, 315.

COUNTER CLAIM, SUFFICIENCY OF ALLEGATION: A defense set up by way of counter claim, alleging that the plaintiff is indebted to defendant in the sum of \$156 for the use of a certain building, and for \$1265 for certain gold bullion, without alleging that said sums are due, or that defendant is entitled to credit therefor on the demand sued on, is no defense.—*Swanholm v. Reeser*, 2 Idaho, 1167 31 Pac. 804.

In an action for damages for an assault and battery a libel published by the plaintiff of and concerning the defendant does not constitute a counter claim within the meaning of this section.—*McDougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98.

A stockholder, who is a creditor of a corporation, can not set off indebtedness of the corporation against the amount of his unpaid subscription, in a suit against him by a creditor of the corporation, to subject the unpaid subscription to the satisfaction of the plaintiff's claim.—*Thompson v. Reno Savings Bank*, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797.

Assignee of judgment takes subject to right of set-off existing at the time of the assignment, although he be a purchaser for a valuable consideration and without notice.—*Porter v. Liscom*, 22 Cal. 403, 83 Am. Dec. 76.

When the defendants were sued as factors, it is not necessary to set forth in their answer their claim for disbursements, commissions, etc., by way of set-off.—*Lubert v. Chauviteau*, 3 Cal. 458, 58 Am. Dec. 418.

RECOUPMENT: In actions on contracts express or implied damages in the nature of recoupment, which do not legally result from the breach of the contract, can not be recovered unless they are specially pleaded.—*Cole v. Swanston*, 1 Cal. 51, 52, Am. Dec. 288; *Cleary v. Folger*, 84 Cal. 216, 24 Pac. 280, 18 Am. St. Rep. 187.

Section 3213. When Defendant Omits to Set Up Counter Claim: If the defendant omits to set up a counter claim

in the cases mentioned in the first sub-division of the last section, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.

1887 R. S. Sec. 4185.

PURPOSE OF STATUTE: Sections 3211 and 3213, this Code, are intended to prevent multiplicity of suits, and to settle all controversies and causes of action between the parties which arise out of, or are connected with, the transaction upon which the plaintiff's action is founded.—*Stevens v. Home Savings & Loan Co. (Idaho)*, 51 Pac. 779. (For opinion on rehearing, see 51 Pac. 986.)

PARTIES, CROSS BILL: Where it appears, either from the pleadings or proof, that the complete determination of the rights of all the parties can not be made without making other persons parties, it is the duty of the court to order such persons brought in, and it should permit the defendant to file a cross bill for that purpose.—*First National Bank v. Bews*, 2 Idaho 1175, 31 Pac. 816.

Section 3214. Cross Demands Deemed Compensated:

When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counter claim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other.

1887 R. S. Sec. 4186.

Section 3215. Answer May Contain Several Grounds of Defense:

The defendant may set forth by answer as many defenses and counter claims as he may have. They must be separately stated, and the several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue.

1887 R. S. Sec. 4187.

EQUITABLE ACTIONS, COUNTER CLAIM SERVICE: The counter claim of the Code, in equitable actions, is a substitute for the cross bill of the former equity practice where the affirmative relief sought by the defendant is against the plaintiff, and the provision of law permitting defendants to litigate between themselves matters germane to the subject of the complaint, carries with it the right of the defendant seeking relief in that regard, to serve an answer in the action in the

nature of a cross bill setting up the facts and claiming such relief. Such an answer, however, is essentially a code pleading, and though the court may require it to be served on the defendant affected thereby, such service is not necessary unless so ordered to preserve the right of the party to have the questions presented by such answer tried and settled by the decree, if the co-defendant affected is before the court.—*Kollock v. Kaiser (Wis.)*, 73 N. W. Rep. 776.

Section 3216. Cross-Complaint, Service and Proceedings:

Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint.

1887 R. S. Sec. 4188.

Answer to cross complaint: Secs. 3211-3215.

EJECTMENT, EQUITABLE DEFENSES: Under an action of ejectment, where the defense is a fraudulent

procurement of the conveyance, and defendant seeks, by way of affirmative relief, to have the conveyance annulled, and makes tender of the consideration paid, and, on acceptance of such an offer by plaintiff, withdraws the tender, it is not error for the trial court, on motion of plaintiff, to strike from the answer of defendant so much thereof as sets up an equitable defense.—*Andola v. Picott* (Idaho), 46 Pac. 928.

FORECLOSURE, AFFIRMATIVE RELIEF, DISMISSAL: Plaintiff commenced a suit to foreclose a mortgage, making the mortgagor and two others (the latter being subsequent purchasers of the mortgagor) parties. The mortgagor answered, denying the execution and acknowledgment of the mortgage, and asking affirmative relief. The proofs being in, the plaintiff moved to dismiss the action as to the mortgagor, waiving any claims for deficiency judgment, which motion was granted by the court. Held, that the action of the court was error.—*Northwestern & Pacific Hypotheek Bank v. Rauch* (Idaho), 51 Pac. 764.

IN ACTION FOR DIVORCE, SUFFICIENCY: Where, in an action for divorce, the cross complaint of the defendant fails to set up a ground of divorce, a decree in favor of defendant upon such cross complaint will be set aside.—*Stover v. Stover* (Idaho), 56 Pac. 263.

WATER RIGHTS, NUMEROUS DEFENDANTS, DISMISSAL: In an ac-

tion by the plaintiffs against numerous defendants to settle the rights of the parties to the waters of a certain stream, various defendants having, in addition to their answers to the complaint of plaintiffs filed cross complaints asking affirmative relief against both the plaintiffs and certain of their co-defendants, the plaintiffs having been nonsuited, the court, on motion of certain of the defendants, dismissed the cross complaints of the other defendants. Held, error. The cross complainants were entitled to be heard upon their cross complaints in the action then pending.—*Taylor v. Bartholomew* (Idaho), 56 Pac. 325.

FAILURE TO ANSWER WAIVER: When cross complaint is not answered, and defendant proceeds to trial as though answer had been filed, he thereby waives the answer.—*Conant v. Jones* (Idaho), 32 Pac. 250.

Defendant claiming affirmative relief must plead it as fully as if he were plaintiff.—*Rose v. Treadway*, 4 Nev. 445, 97 Am. Dec. 546.

A cross complaint is proper in an action to quiet title, when it seeks to enforce an equitable title against the plaintiff as the holder of the legal title.—*Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243.

There may be a cross complaint in an action for divorce or annulment of marriage.—*Wadsworth v. Wadsworth*, 81 Cal. 182, 22 Pac. 648, 15 Am. St. Rep. 38.

DEMURRER TO THE ANSWER.

Section 3217. Demurrer to Answer: The plaintiff may, within the same length of time after service of the answer as the defendant is allowed to answer after service of summons, demur to the answer of the defendant, or to one or more of the several defenses or counter claims set up in the answer.

1887 R. S. Sec. 4193.

See cross references to demurrer to complaint: Sec: 3206.

DEMURRER SUSTAINED, NEW ANSWER, OBJECTION: Where the demurrer to an answer is sustained, and a new answer is filed setting up the same defense, to which no objection is made, and the party making such answer withdraws from the case, and refuses to establish his defense by proof,

the error committed in sustaining the demurrer is not prejudicial.—*Barnes v. Pitts Agricultural Works* (Idaho), 55 Pac. 237.

REVIEW ON APPEAL: An order sustaining a demurrer to a counter claim set forth in an answer may be reviewed on an appeal taken from the final judgment in an action by the defendant.—*Miller v. Hunt et ux* (Idaho), 57 Pac. 315.

Section 3218. Grounds of Demurrer: The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counter claim have been improperly joined;
2. That the answer does not state facts sufficient to constitute a defense or counter claim;
3. That the answer is ambiguous, unintelligible or uncertain.

1887 R. S. Sec. 4194.

SUFFICIENCY OF ANSWER:

Where in an action on a note the answer alleges that the note had been fully paid an objection that it did not set forth a defense was properly overruled.—*Caldwell v. Ruddy*, 2 Idaho, 5, 1 Pac. 339.

INCONSISTENT DEFENSES, OBJECTION TO, HOW MADE: Under the statute regulating pleading, an objection that the answer contains inconsistent defenses can not be made by demurrer, the remedy in such cases being by motion to strike out or elect.—*Caldwell v. Ruddy*, 2 Idaho, 5, 1 Pac. 339.

VERIFICATION.

Section 3219. Verification of Pleadings: Every pleading must be subscribed by the party or his attorney; and when the complaint is verified, or when the state, or any officer of the state, in his official capacity, is plaintiff, the answer must be verified unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or unless an officer of the state, in his official capacity, is defendant. In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and as to those matters, that he believes it to be true; and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney, or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties. When a corporation is a party, the verification may be made by any officer thereof.

1887 R. S. Sec. 4199.

Verification, answer denying genuineness of written instrument, pleaded by copy in justice's court: Sec. 3648.

Complaint in injunction case: Sec. 3285.

Verification, answer, raising question of title, etc., to real property, justice's court, to secure removal: Sec. 3601.

Verification, pleadings in proceedings on special writs, certiorari: Sec. 3759.

Mandamus, petition: Sec. 3770.

Answer: Sec. 3773.

Prohibition: Sec. 3783.

Verification, complaint, election contest: Sec. 3799.

Answer and complaint in forcible entry and detainer: Sec. 3985.

Petition in insolvency: Sec. 3902.

Objection by creditor to discharge in insolvency proceedings and answer thereto: Sec. 3938.

Complaint in proceedings for right of way for development of mines: Sec. 3861.

Accusation for disbarment of attorney: Sec. 3103.

PLEADING, NECESSITY OF VERIFICATION: A complaint by a public officer in his official capacity need not be verified, but the answer to it must

be verified unless it also be by a public officer in his official capacity. But if the complaint be not in fact verified, a general, and not specific verified answer may put in issue the main allegations of the complaint under Section 4183 of the Revised Statutes.—*United States v. Shoup*, 2 Idaho, 459, 21 Pac. 656.

VERIFICATION OF ANSWER, WHEN NECESSARY: When the complaint is not verified the answer need not be verified.—*People ex rel. Huston v. Hunt*, 1 Idaho, 433.

DEFECTIVE VERIFICATION: An answer cannot be disregarded because of a defective verification. A judgment rendered upon the pleadings upon the grounds of such defect is erroneous. The only proper mode of reaching such a defect is by a motion to strike out.—*Pence v. Durbin*, 1 Idaho, 550.

VERIFICATION MADE BY A PERSON NOT A PARTY: A verification of a pleading made by a person not a party to the action is sufficient, if it shows any statutory reason why it is not made by a party to the action.—*Pence v. Durbin*, 1 Idaho, 550.

VERIFICATION A FORMALITY: The verification is no part of the plead-

ings, but is only a formality required to give it solemnity, and if a party does not make a specific objection to the pleadings on that ground, he is presumed to waive it.—Pence v. Durbin, 1 Idaho, 550.

Denial of facts presumptively based on information need be only according to defendant's information and belief, but it must be according to both information and belief, and denial "for want of information to enable them to admit," etc., is not sufficient where both complaint and answer are verified, and a denial of facts presumptively within

defendant's knowledge must be in the positive form, and not on information and belief. Defendant must answer according to his belief, and is precluded from controverting the alleged fact which he believes, though his belief may be founded upon mere hearsay, general report or other information.—Humphreys v. McCall, 9 Cal. 59, 70 Am. Dec. 621 and extensive note covering the subject of denials on information and belief, pages 625 to 638; see note Sec. 3211, subject, "Sufficiency of Denials."

Section 3220. Written Instruments; Unverified Answer Admits: When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified.

1887 R. S. Sec. 4200.

A copy of the note sued on being attached to, and made part of the complaint, the answer, not verified, admits

the genuineness and due execution of the note, and entitles the plaintiff to judgment.—Horn v. Volcano Water Co. 13 Cal. 62, 73 Am. Dec. 569.

Section 3221. Genuineness of Instrument, How Controverted: When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant.

1887 R. S. Sec. 4201.

DUE EXECUTION: The due execution of an instrument in writing goes to the manner and form of its execution, by a person competent to execute it, according to the laws and customs of the country where executed.—Cox v. Northwestern Stage Company, 1 Idaho, 376.

added to or taken from it, which would lay the parties signing, or changing the instrument liable for forgery.—Cox v. Northwestern Stage Company, 1 Idaho, 376.

PRACTICE: A failure by plaintiff to deny, by affidavit the genuineness and due execution of an instrument in writing set forth in the answer, as the foundation of the defense, does not preclude the plaintiff from showing on the trial that it was procured by fraud and misrepresentation.—Cox v. Northwestern Stage Company, 1 Idaho, 376.

GENUINENESS: The genuineness of an instrument in writing goes to the question of its having been the act of the party just as represented, or, in other words, that the signature is not spurious, and that nothing has been

Section 3222. Exceptions to Rules Prescribed by Two Preceding Sections: But the execution of the instruments mentioned in the two preceding sections, is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same, is, upon demand, refused an inspection of the original. Such demand must be in writing, served by copy, upon the adverse party or his attorney, and filed with the papers in the case.

1887 R. S. Sec. 4202.

ANSWER, GENERAL AND SPECIFIC DENIAL: Under our practice generally where a complaint is not

verified, a general denial by the defendant puts in issue the substantive allegations of the complaint; but where the action is brought upon a written

instrument and a copy of such instrument is set out or annexed to the complaint, the genuineness and due execution of the instrument are deemed ad-

mitted unless the answer specifically denies the same and is verified.—*United States v. Alexander*, 2 Idaho, 354, 17 Pac. 746.

GENERAL RULES OF PLEADING.

Section 3223. Pleadings to be Liberally Construed:

In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties.

1887 R. S. Sec. 4207.

Proceedings must be in English; certain abbreviations permitted: Secs. 3040, 3041.

Pleadings must be liberally construed to promote justice.—*Cantwell v. McPherson* (Idaho), 34 Pac. 1095.

The common law rule that a pleading will be taken most strongly against the party making it, based upon the supposition that every suitor will state his case as strongly as the facts will warrant, is applied in the earlier California cases.—*Chipman v. Aughinbaugh*, 5 Cal. 49, 63 Am. Dec. 80; *Green v. Covilland*, 10 Cal. 317, 70 Am. Dec. 725; but it was held in *Canal Co. v. Kidd*, 28 Cal. 684, that under the provisions of this section the rule has no application where the pleader confesses his pleadings to be bad and asks the court to amend in the furtherance of justice. And in *Moore v. Moore*, 56 Cal. 89, it is held that the rule of liberal construc-

tion prescribed by the section should be applied in determining the effect of the allegations of the complaint even when attacked by demurrer.

GENERAL ALLEGATION CONTROLLED BY SPECIFIC: Where the verified complaint in an action for damages for breach of a charter party specifically alleged as damages the difference in value between the cargo as shipped, and as delivered, owing to the careless and negligent manner in which the cargo was loaded and unloaded, the plaintiff can not recover any greater measure of damages than that so averred, though a greater sum is alleged in a general ad damnum clause; and a finding of a greater amount of damages than such differences in value, is at variance with the allegations of the complaint and is not saved by the general ad damnum clause.—*Kerry v. Pacific Marine Co.* 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65.

Section 3224. Sham and Irrelevant Answers, Etc., May be Stricken Out: Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may in its discretion, impose.

1887 R. S. Sec. 4208.

Complaint or answer may be stricken out if party refuse to attend and testify as witness: Sec. 4460.

FRIVOLOUS ANSWER, STRIKING OUT: An answer taking issue only on an immaterial issue of the complaint is frivolous, and may be stricken out on that ground.—*Goldstein v. Krause*, 2 Idaho, 271, 13 Pac. 232.

SHAM ANSWER: Falsity is a test of a sham answer, and an answer shown to be sham by this test may be stricken out.—*Id.*

DENIALS UPON INFORMATION AND BELIEF: An answer which contains denials upon information and belief of matters which are entirely made up of the files and records in a case in which the defendant was a principal party is properly stricken out as sham and frivolous.—*First Nat. Bank of Moscow v. Martin* (Idaho), 55 Pac. 302.

IMMATERIAL ALLEGATIONS DEFINED: If any fact not essential to the claim or defense—in other words,

any except issuable facts—be stated, the adverse party may move to strike out the unessential parts. An unessential or immaterial allegation, is one which can be stricken from the pleading without leaving it insufficient, and need not be proved or disapproved. Whether an allegation be material may be determined by the question, "Can it be made the subject of a material issue?" In other words, "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact alleged is not material.—*Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492 and note.

SHAM DENIALS, STRIKING OUT. WAIVER: Denials contained in an answer may be stricken out, on motion, as sham and irrelevant, when they do not explicitly traverse the material allegations of the complaint but when plaintiff introduces proof of such allegations, without objecting, he waives all objections to the sufficiency of such denials, and is not entitled to an instruc-

tion to the jury to the effect that the facts so averred were admitted to be true for all the purposes of the trial.—*Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

ANSWER DEFECTIVELY STATED, NOT SHAM: An answer so defectively

stating a defense as to be liable to a special demurrer for uncertainty, held, sufficient to prevent a motion to strike out from prevailing and to preclude a judgment for plaintiff on the pleadings.—*Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102.

Section 3225. Statement of Account, Demand for Items: It is not necessary for a party to set forth in pleading the items of an account therein alleged, but he must deliver to the adverse party within ten days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or a judge thereof, may order a further account when the one delivered is too general or is defective in any particular.

1887 R. S. Sec. 4209.

COMPLAINT, JOINDER, COMMON COUNTS: Under this section of the Code of Civil Procedure, providing that it is not necessary for a party to set forth in a pleading the items of an account therein alleged in an action for the balance of an account, all the common counts may be united in one count as one cause of action without any specifications of the sums due upon each.—*Mills v. Glennon*, 2 Idaho, 95, 6 Pac. 116.

When the defendant demands a bill

of particulars, and obtains an order for leave to answer within ten days after the bill is served, and a bill is served which does not contain the items of account, the clerk may enter a default and judgment if the defendant fails to answer within the ten days. If a bill of particulars is too general, the party receiving it should obtain an order for further particulars of the account.—*Providence Tool Co. v. Prader*, 32 Cal. 634, 91 Am. Dec. 598.

Section 3226. Description of Real Property in a Pleading: In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.

1887 R. S. Sec. 4210.

Unless the description is such that the court can say that it is impossible for the proper officer to identify the

land in the field, the complaint is sufficient as against a special demurrer.—*Hihn v. Mangenbery*, 89 Cal. 268, 26 Pac. 968.

Section 3227. Judgments, How Pleaded: In pleading a judgment or other determination of a court, officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction.

1887 R. S. Sec. 4211.

ACTION ON JUDGMENT, SUFFICIENCY OF COMPLAINT: The complaint on an action on a judgment alleged that the judgment was joint as to all defendants and several as to defendant B., that B. had been personally served with summons in Brooklyn, New York; that he appeared by counsel; that judgment was duly rendered against him; that the city court of Brooklyn was a court of record; and that under the constitution and laws of New York it had jurisdiction of the

subject matter of the action. Held, facts sufficient to constitute a cause of action.—*Schenk v. Birdseye*, 2 Idaho, 130, 6 Pac. 128.

In an action upon a foreign judgment an averment in the complaint that a final judgment for a specified sum in accordance with the terms of an order of said court was then and there duly given, made and entered is sufficient as against a general demurrer.—*Dore v. Thornburgh*, 90 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100.

Section 3228. Conditions Precedent, How Pleaded: In pleading the performance of conditions precedent in a contract,

it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance.

1887 R. S. Sec. 4212.

The allegation that the plaintiff had fully performed, on his part, all conditions of the contract is an allegation of performance sufficiently specific under this section.—*California Steam Navigation Co. v. Wright*, 6 Cal. 259, 65 Am. Dec. 511. Also an allegation that plaintiff has performed all and

singular his agreements and covenants with the defendant.—*Moritz v. Lavelle*, 77 Cal. 10, 18 Pac. 803, 11 Am. St. Rep. 229. And under such general allegation, proof may be had that the adverse party has waived the performance of some of the conditions.—*Stephens v. Union Assurance Society*, 16 Utah, 22, 50 Pac. 626, 67 Am. St. Rep. 595.

Section 3229. Statute of Limitations, How Pleaded:

In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section (giving the number of the section and sub-division thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish on the trial the facts showing that the cause of action is so barred.

1887 R. S. Sec. 4213.

Statute of limitations: Chap. CXXVI, Sections 3115-3154.

STATUTE A PERSONAL PRIVILEGE: The statute of limitations is a personal privilege, and, to be made available, must be pleaded. It can not be interposed by argument or inference.—*Frantz v. Idaho Artesian Well & Drilling Co.* (Idaho), 46 Pac. 1026.

PLEADING BY DEMURRER: As to proper form of pleading statute of limitations by demurrer and effect of failure to file statutory form, see *Kelly v. Leachman* (Idaho), 33 Pac. 44.

STATUTE OF FOREIGN STATE: Failure to deny statute of limitations of a foreign state in answer is not an admission under Section 3233.—*Alspaugh v. Reid* (Idaho), 55 Pac. 300; see also Sec. 3233.

PLEADING NEW PROMISE: A complaint upon a promissory note, the collection of which is barred by the statute of limitations, contains a cause of action if it alleges that the defendant has, some time within four years of the day suit was commenced, "in writing, acknowledged and promised to pay the note," such allegation imports that the defendant signed his name to the note.—*Porter v. Elam*, 25 Cal. 291, 85 Am. Dec. 132.

A complaint showing money to have been loaned at a date sufficiently remote to admit the running of the statute of limitations does not raise a presumption that the statute has run. If the allegation is consistent with the

supposition that the debt is not barred by reason of a promise in writing, or written acknowledgment of the debt, the defense must be raised by answer.—*Curtis v. Aetna Life Ins. Co.* 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114, and a complaint in ejectment is not subject to a general demurrer, where it is alleged that defendant ousted plaintiff from the premises at a date more than five years prior to the commencement of the action, there being nothing in the complaint tending to show that the defendant's acts were accompanied with any claim of title on his part.—*Peter v. Stephens*, 11 Mont. 115, 27 Pac. 403, 28 Am. St. Rep. 448.

DEMURRER, APPEAL, PRESUMPTION: On demurrer to a complaint, founded upon the statute of limitations, if the complaint fails to show whether the contract in suit was verbal or in writing, it will be presumed to have been in writing for all purposes of the demurrer. On appeal, all presumptions are in favor of the judgment; and if a demurrer to a complaint, founded upon the statute of limitations, has been sustained, and the transcript fails to show when the action was commenced, it will be presumed that it was not commenced until after the statute had run.—*Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 334.

A defendant relying on the statute of limitations should not allege matter of law, but the facts which bring him within the statute.—*Boyd v. Blakeman*, 29 Cal. 20, 87 Am. Dec. 146.

Section 3230. Private Statute, How Pleaded: In pleading a private statute or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage.

1887 R. S. Sec. 4214.

Section 3231. Libel and Slander, How Stated in Complaint: In an action for libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish on the trial that it was so published or spoken.

1887 R. S. Sec. 4215.

Words having covert or ambiguous meaning may be alleged and proved to have been used with intent of defaming, and to have been understood in a particular defamatory sense by those to whom they were published. Libelous meaning of words not actionable per se must be alleged to have been understood by those to whom they were published, as well as that the defendant so intended and understood them to mean, or the complaint is demurrable.—*Maynard v. Fireman's Fund Ins. Co.* 34 Cal. 48, 91 Am. Dec. 672.

In an action for slander, the refusal of the court to strike from the answer an allegation of mitigating circum-

stances which came to the knowledge of the defendant after the speaking of the defamatory words, is not a prejudicial error, if the court subsequently instruct the jury not to consider such circumstances in mitigation. In an action for slander, evidence of the financial standing of the defendant is admissible on behalf of the plaintiff.—*Barkley v. Copeland*, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413.

In an action for slander of title it is necessary to allege in the complaint, distinctly and particularly, the facts which show wherein the plaintiff has sustained special damage.—*Burkett v. Griffith*, 90 Cal. 522, 27 Pac. 527, 25 Am. St. Rep. 151.

Section 3232 Answer in Such Cases: In the actions mentioned in the last Section, the defendant may in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

1887 R. S. Sec. 4216.

JUSTIFICATION: A defendant in an action of slander or libel is not required to justify every word of the defamatory matter, but it is sufficient if the substance, gist, or sting of the libelous

charge be justified, and immaterial variances and defects of proof upon minor matters are to be disregarded if the substance of the charge be justified.—*Hearne v. De Young*, 119 Cal. 670, 52 Pac. 150, 499.

Section 3233. Allegations not Denied, When to be Deemed True: Every material allegation of the complaint not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counter claim, must, on the trial be deemed controverted by the opposite party.

1887 R. S. Sec. 4217.

ADMISSIONS, FAILURE TO DENY ALLEGATIONS: An allegation in the complaint not denied in the answer is sufficient to sustain the finding that the facts stated therein are true.—*Broadbent v. Brumback*, 2 Idaho, 336, 16 Pac. 555.

APPLICATION FOR PATENT, ADVERSE CLAIM: Under the section providing that every material allegation of the complaint not controverted by the answer must be taken as true, an allegation in a complaint in an action to decide an adverse claim, filed against an application for a patent to a mining

location, that plaintiffs filed in the land office their adverse claim to the property in dispute, need not be proved when not denied by the answer.—*Burke v. McDonald*, 2 Idaho, 646, 33 Pac. 49.

NEW MATTER, COUNTER CLAIM: Under the provisions of Section 4217, Rev. St., when new matter is pleaded in the answer in avoidance or as constituting a defense or counter claim, such new matter is deemed denied or controverted by the plaintiff.—*Alspaugh v. Reid* (Idaho), 55 Pac. 300.

STATUTE OF LIMITATIONS, FOREIGN STATE: When the statute of limitations of a foreign state is set up as a defense it is error for the court on motion, without trial, to render a judgment of dismissal, for the reason that the plaintiff, under the provisions of said Section 4217, Rev. St., is deemed to have controverted the new matter thus set up as a defense, and the defendant is put on his proof. The plaintiff may deny the existence of such statute of limitations as pleaded, or may confess and avoid it in any manner the law permits.—*Alspaugh v. Reid* (Idaho), 55 Pac. 300.

EVIDENCE, ADMISSIONS, PLEADINGS: It is error for the court to instruct the jury that it is necessary for the plaintiff to prove facts alleged in the complaint and not denied in the answer. The failure to deny a material allegation contained in a complaint is an admission of it; and the admission is conclusive evidence of the fact admitted.—*Lillienthal & Co. v. Anderson*, 1 Idaho, 673.

Section 3234. A Material Allegation Defined: A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

1887 R. S. Sec. 4218.

Immaterial allegations defined, and

MATTER DEEMED ADMITTED: An allegation of corporate existence not denied is deemed admitted.—*Moynihan v. Drobaz*, 124 Cal. 212, 56 Pac. 1026, 71 Am. St. Rep. 46. An allegation that defendant was a stockholder in a corporation if not denied is deemed admitted.—*McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 145.

MATTER IN REPLY: When a defendant pleads the statute of limitations matters upon which the plaintiff relies to relieve him from the bar of the statute are deemed to have been pleaded in reply to the answer.—*Fox v. Fay*, 89 Cal. 339, 26 Pac. 207, 23 Am. St. Rep. 474.

If a defendant, sought to be charged as trustee on a contract within the statute of frauds, admits the contract in his answer and does not claim the benefit of the statute, he is considered as waiving its protection, but if he claims the benefit of the statute in his answer, he is entitled to it.—*Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142.

Defense of statute of frauds may be relied upon though not pleaded in reply to a counter claim, under a statute providing that "the statement of any new matter in the answer in avoidance or constituting a defense or counter claim, must on the trial, be deemed controverted by the opposite party.—*Steed v. Harvey*, 18 Utah, 367, 54 Pac. 1011, 72 Am. St. Rep. 789 and note; *Parke v. Boulware* (Idaho), 63 Pac. 1045.

when they may be stricken out on motion: Note to Sec. 3224.

Section 3235. Supplementary Complaint and Answer: The plaintiff and defendant, respectively may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer.

1887 R. S. Sec. 4219.

Motion to file supplemental pleadings is addressed to the sound legal discretion of the court.—*Harding v. Minear*, 54 Cal. 502; *Seehorn v. Big Meadows*, etc., *Road Co.* 60 Cal. 249, and the court may impose such terms as may be just and proper.—*Greenwood v. Adams*, 50 Cal. 74, 21 Pac. 1134. The discretion, however, is not an arbitrary one, and it is limited so as not to allow the substitution of a new and independent cause of action by way of a supple-

mental complaint; but it is no objection to a supplemental complaint that different or additional relief is asked for.—*Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119.

SUPPLEMENTAL ANSWER IN EJECTMENT: A title acquired by a sheriff's deed, executed after the commencement of a suit in ejectment, can only be made available by the defendant in the action by setting it up in a supplemental answer.—*Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256.

Section 3236. Pleadings to be Filed and Served: All pleadings subsequent to the complaint must be filed with the clerk and copies thereof served upon the adverse party, or his attorney.

1887 R. S. Sec. 4220.

Manner of service of pleadings on party or attorney: Secs. 3711 to 3717.

Extending time to serve papers: Sec. 3744.

Amended pleadings, service of: Secs. 3240 and 3241.

Lost pleadings, supplying copy: Sec. 3738.

VARIANCE, MISTAKES AND AMENDMENTS.

Section 3237. Variance, When Material: No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that the party has been so misled, the court may order the pleading to be amended, upon such terms as may be just.

1887 R. S. Sec. 4225.

Immaterial errors: Sec. 3243.

VARIANCE IN PLEADING AND PROOF: Variance between allegation of complaint and proof must be disregarded, unless such variance actually misled the adverse party to his prejudice in making his defense.—*Hawkins v. Pocatello Water Co., Limited* (Idaho), 35 Pac. 711.

OBJECTIONS, WHEN MADE: If there is a variance between the cause of action, as stated in the complaint, and the proofs, the objection can not be first made on motion for a new trial, or on appeal to this court.—*Aulbach v. Dahler et al.* (Idaho), 43 Pac. 322.

IMMATERIAL VARIANCE DISREGARDED: It is considered no variance from the proof if the facts show a substantial right to recover under the allegations.—*People v. Slocum et al.* 1 Idaho, 62-74.

JOINDER DEFENDANTS, PLAINTIFF MISLED: H. made a contract to perform certain work and supply certain materials for three defendants. The contract was made with defendant M. On the trial, the other two defendants consented to the taking of judgment against them. After the conclusion of plaintiff's evidence, the counsel for the defendant moved for a non-suit, on the ground of variance between the pleadings and the proofs. The district court overruled the motion for a non-suit, and, defendant declining to put in any evidence, judgment was rendered in favor of plaintiff against defendant M. Held, that under the statutes of Idaho, the action of the district court was correct; especially as the acts of defendant were calculated to lead plaintiff to the belief that defendants were jointly interested in the contract. *Hewitt v. Maize et al.* (Idaho), 51 Pac. 607.

PARTY ALLEGING PREJUDICE.

SHOWING: If a variance, between the allegations and proofs has misled a party to his prejudice, it is his duty to show that fact to the court at the time it occurs.—*Aulbach v. Dahler et al.* (Idaho), 43 Pac. 322.

IMMATERIAL VARIANCE: Where the complaint against a railroad company, which had leased its road to another company, alleged that plaintiff was an employee of the defendant, and the proof showed that he was in fact an employee of the lessee of the defendant, the variance is immaterial, where it appears that his injury resulted from the negligence of the defendant in the defective construction of its road.—*Lee v. S. P. R. R. Co.* 116 Cal. 97, 47 Pac. 932, 58 Am. St. Rep. 140. Variance between pleadings and proofs is immaterial, where suit is brought by a creditor of a corporation against the defendants, as subscribers to the capital stock, to compel the payment of their unpaid subscriptions, but the agreement established is an implied rather than an express agreement, by which the defendants deposited a certain sum of money with the corporation as its business capital, and agreed among themselves not to be liable for any further amount.—*Thompson v. Reno Savings Bank*, 19 Nev. 242, 9 Pac. 121, 3 Am. St. Rep. 883.

DISREGARDING SURPLUS ALLEGATIONS: If a plaintiff avers more than is necessary, and fails to sustain immaterial and redundant averments, but does prove all the material facts upon which a right to belief is based, and no motion to correct the pleading has been made, it will be treated as sufficient, and the surplus allegations disregarded.—*Kelly v. Clark*, 21 Mont. 291, 69 Am. St. Rep. 668, 53 Pac. 959.

Section 3238. Immaterial Variance, How Provided for: Where the variance is not material, as provided in the last Section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

1887 R. S. Sec. 4226.

Amendment, variance, forcible entry and detainer, without terms: Sec. 3989.

Section 3239. What not to be Deemed a Variance: Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two Sections, but a failure of proof.

1887 R. S. Sec. 4227.

Section 3240. Amendments of Course and Effect of Demurrer: Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading. A demurrer is not waived by filing an answer at the same time; and when the demurrer to complaint is overruled and there is no answer filed, the court may upon such terms as may be just, allow an answer to be filed. If a demurrer to the answer be overruled, the facts alleged in the answer must be considered as denied, to the extent mentioned in Section 3233.

1887 R. S. Sec. 4228.

Amendments, election contests: Sec. 3806.

AMENDMENTS, DISCRETION OF THE COURT: A decision of the trial court will not be disturbed on appeal except when the exercise of such discretion has deprived the party complaining of some substantial right. It has been held that such amendments should not be allowed after a new trial has been granted nor when amendments offered deny matters before admitted by the pleadings to be true.—*Palmer v. Utah Northern Railway Co.* 2 Idaho, 350, and case therein cited at page 352.

SUBSEQUENT PROCEEDINGS:

AMENDED PLEADINGS: When an amended complaint is filed it takes the place of the original, and all subsequent proceedings in the case are based upon the amended pleadings.—*People ex rel. Huston v. Hunt*, 1 Idaho, 433. But the original pleading may be offered in evidence as an admission tending to establish any fact stated therein.—*Bloomingtondale v. Durell*, 1 Idaho, 33.

AMENDMENT OF DEMURRER: Demurrer is a pleading and may be amended once, of course, and without costs, but where a party files a second demurrer without leave of the court, it was in the discretion of the court to order the same stricken out.—*Kelly v. Leachman* (Idaho), 33 Pac. 44.

Section 3241. Amendments, Discretion and Power of Court: The court may, in furtherance of justice and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow upon such terms as may be just, an amendment to any pleading or proceeding in other particulars and may, upon like terms, allow an answer to be made after the time limited by this Code, and also relieve a party, or his legal representative from a

judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and whenever, for any reason satisfactory to the court or the judge thereof, the party aggrieved has failed to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or the judge thereof in vacation, may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representative at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. When in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property and the officer taking the property or the sureties on any bond or undertaking, is sued for taking the same, the officer or sureties may, in their answer, set up the true value of the property, and that the person in whose behalf said affidavit was made, was entitled to the possession of the same, when said affidavit was made or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit and give judgment according to the right of possession of said property at the time the affidavit was made.

1887 R. S. Sec. 4229.

AMENDMENTS: District court has same power to allow on cases brought up on appeal: Sec. 3686.

For the purpose of bringing in new parties in actions for ejectment and claim and delivery: Sec. 3178.

AMENDMENT, NEW PLAINTIFF SUBSTITUTED, ERROR: Under the provisions of this section, it is error to permit a new plaintiff and new cause of action to be submitted under the guise of an amendment to the original complaint.—*Hallett v. Larcom* (Idaho), 51 Pac. 109.

AMENDMENT DURING TRIAL. Where during the progress of the trial, the defendant asks leave to amend his answer, and it is apparent that such amendment will entirely or materially change the issues, the granting of such leave is a matter of discretion with the trial court, and to the granting of which the court may impose terms.—*Lowe et al. v. Long* (Idaho), 47 Pac. 93.

DEMURRER, AMENDMENT: A demurrer may be amended, but leave to do so must first be obtained.—*Dunbar v. Board of Commissioners of Canyon County* (Idaho), 49 Pac. 409.

AMENDED PLEADING SUPERSEDES ORIGINAL: The filing of an amended complaint renders the original complaint functus officio as a pleading; and by relation dates back to the time

of filing the original. When it purports to contain a complete statement of the cause of action; it takes the place of the original and becomes the complaint upon which the cause is to be tried.—*Woody v. Jamieson* (Idaho), 40 Pac. 61. (See cases cited.)

SETTING ASIDE DEFAULT, SHOWING: An application by the defendant to set aside a default judgment after the term at which such judgment was rendered must be supported by evidence showing mistake, inadvertence, surprise, or excusable neglect on his part, and accompanied by an affidavit of merits showing facts which constitute defense to the plaintiff's action.—*Holland Bank v. Lieuallen et al.* (Idaho), 53 Pac. 398.

SAME, AFFIDAVITS OF MERIT: Correct practice and the rule to be followed in this state is that, in addition to showing one of the grounds mentioned in this section the defendant must, in his affidavit of merits, state facts upon which his defense is based, must set forth the substance of his defense, so that the court may judge for itself whether the alleged defense is frivolous or meritorious. No such showing was made in this case.—*Holland Bank v. Lieuallen et al.* (Idaho), 53 Pac. 398.

SAME, DISCRETION OF COURT: The discretion of the trial court in refusing to set aside a default judgment

will not be disturbed, unless it is shown that such discretion has been abused.—*Holland Bank v. Lieuallen* (Idaho), 53 Pac. 398.

Relief from mistakes, etc., application, within what time: See *Wilcox v. Wells* (Idaho), 51 Pac. 985.

Failure of party to apply for the relief sought during the term at which judgment, order or proceedings complained of were taken: See *Baker v. Knott* (Idaho), 35 Pac. 172.

ERRONEOUS JUDGMENT, REMEDY BY APPEAL ONLY, WHEN: An erroneous judgment cannot be set aside on motion or application made more than six months after judgment; and when, on motion to set aside a judgment it appears that the court had jurisdiction of the subject matter of the action, and of the person of the defendant, the motion should be denied, however erroneous the judgment may be, the remedy of the aggrieved party being by appeal, and not by motion.—*Bunnell & Eno Inv. Co. v. Curtis* (Idaho), 51 Pac. 767.

MODIFICATION OF ERRONEOUS JUDGMENT APPEAL: Where it is ascertained by the court that an action has been brought on a contract which provides for illegal interest, under the provisions of Section 630, Pol Code it is the duty of the court to render judgment as directed by said section, and, if it fails to do so, the proper procedure on behalf of the state is to move within six months after the adjournment of the term at which such judgment was rendered for the modification of the erroneous judgment, and in case such motion is denied, an appeal lies to this court.—*State v. Eves et al.* (Idaho), 53 Pacific 542.

SAME, APPLICATION WITHIN SIX MONTHS: When a court fails in cases that fall within the provisions of Section 630 Pol. Code to enter judgment as therein directed, the correct practice is for the state on behalf of the county to make a proper showing upon notice to all parties to the record, and move to have such judgment modified so as to make it conform to the provisions of said section, and, if the court denies such motion, to appeal from the order denying the same, such application should be made within six months after the adjournment of the term at which the judgment was entered, as provided by this section.—*State v. Eves* (Idaho), 53 Pac. 543.

BILL OF REVIEW: In an equitable action commenced for the purpose of procuring a new trial of a former action, the complaint, designated, in equity practice, "bill of review," must affirmatively show that by reason of

fraud, mistake, or surprise, against which the complainant could not by the use of reasonable diligence, have protected himself in the original action, by motion for a new trial, by application to vacate or modify the judgment on the ground of mistake, inadvertence, surprise, or excusable neglect, made within six months after the adjournment of the term at which the judgment was rendered, or by appeal, he could not have obtained the relief asked, thus showing a necessity of resorting to equity.—*McMillan v. Wooley* (Idaho), 51 Pac. 1029. This section construed and applied in *Wilcox v. Wells* (Idaho), 51 Pac. 985.

JUDGMENT BY DEFAULT. MISTAKE IN DATE OF SERVICE, RELIEF: On motion to set aside a judgment entered by default, where the affidavit of merits shows that the defendant was under the impression that the summons was served on a certain date, and had so noted a memorandum on the copy served on him, and so reported to his counsel, who for that reason served a demurrer and application for change of venue one day after the entry of the default, believing the appearance was in time(held, that such affidavits show such a mistake as is clearly within the provisions of this section, which permits the court to grant relief, and which the spirit of the Code requires to be granted, and it is error not to grant such motion.—*Miller v. Carr*, 116 Cal. 378, 48 Pac. 324, 58 Am. St. Rep. 180.

VACATING FOR MISTAKE OF OFFICER OF THE COURT: It is proper to open a default against a defendant, upon the ground of his excusable negligence, where his attorney was informed by the clerk that no business would be transacted by the court until after a certain date, and, relying upon this statement, he did not appear until such date, when he found that his pending demurrer was overruled.—*Anaconda Mining Co., v. Saile*, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472.

MISTAKE OF LAW, ERRONEOUS ADVICE OF COUNSEL: If a defendant fails to make his defense to an action because, after consulting with an attorney, he is advised by such attorney that his defense is not good in law, and believes and relies upon the advice so given, he may, on motion, be relieved from a judgment subsequently entered against him by default, if the attorney was mistaken, and the defense was good in law and would have been interposed but for the advice received. A statute authorizing relief to be granted upon motion from a judgment entered against a party through his mistake, inadvertence, or excusable neglect is not re-

stricted to mistakes of fact, but authorizes relief to be granted on account of mistakes of law.—*Douglass v. Todd*, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247.

The defendant is entitled to have a judgment vacated on motion on the ground that it was recovered against her through her excusable neglect, when it appears that she was vigilant from her first knowledge of the action, that she employed an attorney to defend it in the state wherein it was pending and of which she was a nonresident; that she forwarded to him a verified answer; and that he refused to file it because she did not accept a compromise negotiated by him and refused to open letters addressed to him and forwarded by her and her counsel from her place of residence. She can not be regarded as inexcusably negligent, thought she received a letter from the attorney stating that unless she accepted the terms of the compromise he would have nothing more to do with the case and would not file the answer, when she afterward wrote to him explaining that the compromise had never been authorized by her and requesting him to file the answer. She could not anticipate that he would refuse to open and read her letter.—*Simpkins v. Simpkins*, 14 Mont. 386, 36 Pac. 759, 43 Am. St. Rep. 641.

JUDGMENT VOID FOR WANT OF JURISDICTION OVER DEFENDANT MAY BE SET ASIDE AFTER THE LAPSE OF TWELVE YEARS, ON MOTION: The power of the court to vacate a judgment which appears to be void from an inspection of the judgment roll is inherent. It does not expire by lapse of time, nor is it restricted by this section, designating the time within which motions may be made for relief against judgments entered against a party by mistake, accident, surprise, or excusable neglect. The execution of a void judgment will be stayed by the court. Courts will not permit their process to be abused by attempts thereunder to enforce void judgments. A motion to set aside a judgment is a direct and not a collateral attack on the judgment; hence errors which might be the subject of review on appeal therefrom may be considered on an appeal from an order denying the motion.—*People v. Greene*, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448. And a judgment will be set aside for want of jurisdiction of the person, without regard to domicile, as where a judgment is rendered against a defendant for alimony and custody of children, upon service of summons by publication, where the defendant and children were temporarily absent from the state.—*De La Montanya v. De La*

Montanya, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165 and note.

But where the motion is made upon an affidavit of merits and not for want of jurisdiction, the supreme court will not interfere with the action of the trial court in making an order setting aside a default, unless it affirmatively appears that the court was without jurisdiction to make the order or abused its discretion in making it.—*Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52.

The defendant has a right to appeal from the judgment or to move in the court below. Both remedies are given, and the defendant has a right to avail himself of either, and probably of both.—*Howard v. Gallaway*, 60 Cal. 10.

RELIEF IN EQUITY: Equity will set aside a judgment obtained by default, upon a service of summons by publication in an action to quiet title, though more than one year has elapsed from the rendition of the judgment, where it appears that the plaintiff in equity had no knowledge of the pendency of the action or of the rendition of the judgment until more than one year after its date, and that the plaintiff in the original action knew that the allegations in his complaint were false, and made a false affidavit that he had a cause of action, in order to secure a service of summons by publication.—*Dunlap v. Steere*, 92 Cal. 344, 28 Pac. 563, 27 Am. St. Rep. 143.

FRAUD: Where judgment is obtained against a corporation by default through conspiracy with its managing agent to conceal fact of service of summons, the proceedings being regular in form, the remedy is not by motion to set aside but by bill in equity.—*Lang Syne G. M. Co. v. Ross*, 20 Nev. 127, 18 Pac. 358, 19 Am. St. Rep. 337.

In actions for divorce and annulment of marriage, the court should be more liberal in relieving against defaults than in other cases.—*Wadsworth v. Wadsworth*, 81 Cal. 182, 22 Pac. 648, 15 Am. St. Rep. 38.

AMENDMENTS, POWER AND DISCRETION OF COURT: The statutes authorizing amendments to pleadings, have in view the furtherance of justice, and this passes the whole matter over to the discretion of the court, but if such discretion be abused, or illegally exercised, an appellate court will interpose. The court may allow the statute of limitations to be interposed on amendment in the furtherance of justice.—*Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348.

But it is not error for a court to refuse permission to set up the statute of limitations after answering to the

merits.—*Stuart v. Lander*, 16 Cal. 372, 76 Am. Dec. 538.

It is within the discretion of the trial court to relieve a plaintiff from the effect of a stipulation submitting the case on a motion for a nonsuit, and to allow him to file an amended complaint, and its action will not be disturbed on appeal in the absence of a showing of an abuse of discretion.—*Robinson v. Insurance Co.* 103 Cal. 1, 36 Pac. 955, 42 Am. St. Rep. 93.

An amendment of an answer may be permitted after a motion has been made by the plaintiff for judgment on the pleadings.—*Matteucci v. Whelan*, 123 Cal. 312, 55 Pac. 990, 69 Am. St. Rep. 69.

AMENDMENT OF COST BILL: The court has power in the exercise of its discretion to allow the amendment of a bill of costs and the affidavit accompanying it.—*Burnham v. Hays*, 3 Cal. 115, 58 Am. Dec. 389.

AMENDMENT OF JUDGMENT TO CONFORM TO THE FACTS: Every court of record has inherent power to cause its acts and proceedings to be correctly set forth in its records. An

amendment of a judgment can be allowed only for the purpose of making the record speak the truth, and not for the purpose of revising or changing the judgment.—*Scamman v. Bonslett*, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226; *Kaufman v. Shaine*, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139.

AMENDMENT CHANGING CAUSE OF ACTION: It is not an abuse of discretion for the court to permit an amendment counting upon a quantum meruit, when the original complaint sought to recover according to the terms of a contract, and the facts stated in both complaints are substantially identical.—*Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164 and note.

A complaint filed by a creditor of a corporation, in his own interest, to reach unpaid subscription of stockholder, may be amended so that the suit shall be for the benefit of himself, and other creditors who may choose to some in, establish their claims, and contribute to the expense of the suit.—*Thompson v. Reno Savings Bank*, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797.

Section 3242. Suing a Party by a Fictitious Name, When Allowed: When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly.

1887 R. S. Sec. 4230.

Section 3243. No Error or Defect Regarded Unless It Affects Substantial Rights: The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect.

1887 R. S. Sec. 4231.

Papers in action are not rendered invalid by omission or defect in title: Sec. 3739.

ABBREVIATION, TECHNICAL OBJECTION: The abbreviations "U. S." referred to, are constantly used in statutes in pleadings, and in almost all other classes of instruments, or writings, and have a known, definite and unmistakable signification. They are constantly referred to as the initial letters of the term "United States," and are quite as frequently used as any abbreviations or initial letters in the language. It is at most merely a technical

objection, which does not affect the substantial merits of the action.—*People v. Sloper, et al.* 1 Idaho, 158.

This section commented upon and applied.—*Wheeler v. Commercial Bank of Moscow (Idaho)*, 46 Pac. 830; cited in *Bank of Troy, Kan. v. Linford et al. (Idaho)*, 43 Pac. 680.

Answer may be held to aid complaint which distinctly sets out most of the facts necessary to entitle the plaintiff to the relief sought, but omits some material facts, where the facts so admitted are clearly stated and admitted in the answer.—*Hawthorne v. Smith*, 3 Nev. 182, 93 Am. Dec. 397.

CHAPTER CXXXI.

ARREST AND BAIL.

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LIMITATION OF REMEDY. AFFIDAVIT, ORDER AND SERVICE.

Section 3244. Arrests Limited to Provisions of Code: No person can be arrested in a civil action, except as prescribed in this Code.

1887 R. S. Sec. 4240.

No imprisonment for debt except in cases of fraud: Art. 1, Sec. 15, Const.

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Proceedings may be held on Sunday or holiday: Sec. 3017.

Arrest of absconding debtor after execution: Sec. 3563.

Arrest and bail in forcible entry and detainer: Sec. 3984.

Execution: Sec. 3532. Sub. 2.

Execution against property must be returned unsatisfied before defendant can be arrested: Sec. 3534.

Plaintiff failing to advance funds for defendant prisoner, defendant is discharged and execution can be enforced against his property only: Sec. 3973.

Proceedings for discharge of persons imprisoned on execution: Sec. 3962 to 3973.

Debtor after being discharged upon his application and taking debtor's oath as prescribed in Sec. 3967, or when discharged by order of plaintiff is exempt from further arrest, but the judgment may be enforced against his property: Secs. 3971, 3972, and 3973.

Section 3245. Defendant, When Subject to Arrest: The defendant may be arrested as hereinafter prescribed, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon a contract express or implied where the defendant is about to depart from the State with intent to defraud his creditors, or when the action is for willful injury to person, to character, or to property, knowing the property to belong to another;

2. In an action for a fine or penalty, or on a promise to marry, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such or by any other person in a fiduciary capacity; or for misconduct or neglect in office or in a professional employment or for a willful violation of duty;

3. In an action to recover the possession of personal property unjustly detained when the property, or any part thereof, has been concealed, removed, or disposed of to prevent its being found or taken by the sheriff;

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought;

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

1887 R. S. Sec. 4241.

Grounds for arrest in civil actions in justice's court are more restricted: Sec. 3623.

It was held in *Ex parte Prader*, 6 Cal. 239, under a constitutional provision similar to ours, that a party can not be imprisoned under a judgment in a civil action for assault and battery, under Sub. 1 of this section; such judgment is a debt. This case is cited and

criticized in 37 Am. St. Rep. 762, as based upon a theory not to be reconciled with the doctrine that proceedings in tort are not within the purview of the constitution.—See *State v. Brewer*, 38 South Carolina 263, 16 S. E. 1001, 37 Am. St. Rep. 752, and extended note as to what statutes violate provisions against imprisonment for debt.—Pages 758 et seq.

Section 3246. Order for Arrest, by Whom Made: An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought or from a probate judge.

1887 R. S. Sec. 4242.

Section 3247. Affidavit for Order of Arrest Required: The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in Section 3245. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be filed with the clerk of the court.

1887 R. S. Sec. 4243.

The facts relied upon must be specifically stated, so that the court may for itself deduce the grounds relied upon, and where the language of the statute is departed from, the failure to

employ words of similar import is fatal. Statement of a mere conclusion or belief of affiant is insufficient. An affidavit upon information and belief is fatally defective.—*Ex. parte Fukumoto*, 120 Cal. 316, 62 Pac. 726.

Section 3248. Undertaking Required of Plaintiff: Before making the order, the judge must require a written undertaking on the part of the plaintiff, with sureties in an amount to be fixed by the judge, which must be at least five hundred dollars, to the effect that the plaintiff will pay all costs which may be adjudged

to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking. The undertaking must be filed with the clerk of the court.

1887 R. S. Sec. 4244.

Section 3249. Order When Made, and Its Form:

The order may be made at the time of the issuing of the summons, or at any time afterwards before judgment. It must require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum and to return the order at a time therein mentioned, to the clerk of the court in which the action is pending.

1887 R. S. Sec. 4245.

Section 3250. Service of Affidavit and Order: The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy of the affidavit, and also, if desired, a copy of the order of arrest.

1887 R.S. Sec. 4246.

Section 3251. Arrest, How Made: The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law.

1887 R. S. Sec. 4247.

BAIL AND RIGHTS AND LIABILITIES OF SURETIES.

Section 3252. Defendant to be Discharged on Bail or Deposit: The defendant, at any time before execution, must be discharged from the arrest, either upon giving bail or depositing the amount mentioned in the order of arrest.

1887 R. S. Sec. 4248.

Section 3253. Bail, How Given: The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest that the defendant will at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

1887 R. S. Sec. 4249.

Section 3254. Surrender of Defendant: At any time before judgment or within ten days thereafter, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested.

1887 R. S. Sec. 4250

Section 3255. Procedure upon Surrender when Bail Exonerated: For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may them-

selves arrest, or, by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail are exonerated, if such arrest, delivery, or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender be not made within ten days after judgment, the bail are finally charged on their undertaking, and bound to pay the amount of the judgment within ten days thereafter.

1887 R. S. Sec. 4251.

Section 3256. Bail, How Proceeded Against: If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of the original judgment.

1887 R. S. Sec. 4252.

Section 3257. Bail, how Exonerated: The bail are exonerated by the death of the defendant or his imprisonment in the State prison, or by his legal discharge from the obligation to render himself amenable to the process.

1887 R. S. Sec. 4253.

RETURN OF ORDER. EXCEPTIONS TO AND QUALIFICATIONS OF SURETIES.

Section 3258. Return of Process, Exceptions to Undertaking: Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon; together with a copy of the undertaking of the bail. The original undertaking he must retain in his possession until filed, as herein provided. The plaintiff within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court.

1887 R. S. Sec. 4254.

Section 3259. Notice of Justification. New Undertaking: Within five days after the receipt of notice, the sheriff or defendant may give the plaintiff or his attorney, notice of the justification of the same, or other bail (specifying the places of residence and occupation of the latter), before the judge of the court or probate judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given there must be a new undertaking.

1887 R. S. Sec. 4255.

Justification of bail: Sec. 3261.

Section 3260. Qualifications of Bail: The qualifications of bail are as follows:

1. Each of them must be resident and householder or freeholder within the State;

2. Each must be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this Chapter, over and above all his liabilities, exclusive of property exempt from execution; but the judge on justification, may allow more than two sureties to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

1887 R. S. Sec. 4256.

Qualifications of bail: Sec. 3749.

Section 3261. Justification of Bail: For the purpose of justification each of the bail must attend before the judge at the time and place mentioned in the notice, and may be examined on oath on the part of the plaintiff touching his sufficiency, in such manner as the judge in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff.

1887 R. S. Sec. 4257.

Section 3262. Allowance of Bail: If the judge find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the sheriff is thereupon exonerated from liability.

1887 R. S. Sec. 4258.

DEPOSIT IN LIEU OF BAIL.

Section 3263. Deposit of Money with Sheriff: The defendant may at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail be reduced, as provided in this Chapter, the defendant may deposit such amount instead of giving bail. In either case the sheriff must give the defendant a certificate of the deposit made, and the defendant must be discharged from custody.

1887 R. S. Sec. 4259.

Deposit in court: Sec. 3324 et seq.

Section 3264. Payment of Money into Court: The sheriff must, immediately after the deposit, pay the same into court and take from the clerk receiving the same, two certificates of such payment, the one of which he shall deliver to the plaintiff's attorney and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited as in other cases of delinquency.

1887 R. S. Sec. 4260.

Section 3265. Substituting Bail for Deposit: If money is deposited, as provided in the last two Sections, bail may be given and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited must be refunded to the defendant.

1887 R. S. Sec. 4261.

Section 3266. Money Deposited, how Applied: Where money has been deposited, if it remains on deposit at the time of the recovery of a judgment in favor of the plaintiff, the clerk must, un-

der the direction of the court, apply the same in satisfaction thereof; and after satisfying the judgment, refund the surplus, if any to the defendant. If the judgment is in favor of the defendant, the clerk must, under like direction of the court, refund to him the whole sum deposited and remaining unapplied.

1887 R. S. Sec. 4262.

LIABILITY OF SHERIFF.

Section 3267. Sheriff, When Liable as Bail: If, after being arrested, the defendant escape or is rescued, the sheriff is liable as bail; but he may discharge himself from such liability by giving bail at any time before judgment.

1887 R. S. Sec. 4263.

Section 3268. Proceedings on Judgment Against Sheriff: If a judgment is recovered against the sheriff upon his liability as bail, and an execution thereon is returned unsatisfied in whole or in part, the same proceedings may be had on his official bond, for the recovery of the whole of any deficiency, as in other cases of delinquency.

1887 R. S. Sec. 5264.

VACATING ORDER.

Section 3269. Motion to Vacate Order or Reduce Bail: A defendant arrested may, at any time before the trial of the action, or if there be no trial, before the entry of judgment, apply to the judge of the court in which the action is pending, or to the court, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the order of arrest was made.

1887 R. S. Sec. 4265.

Section 3270. When Order Vacated or Bail Reduced: If, upon application, it appears that there was not sufficient cause for the arrest, the order must be vacated; or if it appears that the bail was fixed too high, the amount must be reduced.

1887 R. S. Sec. 4266.

CHAPTER CXXXII.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

Section.

- 3271. When proceedings may be had.
- 3272. Affidavit and its requisite.
- 3273. Requisition to sheriff to take property.
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- 3275. Exception to sureties and proceedings thereon.

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- 3276. Defendant, when entitled to re-delivery.
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- 3279. Property concealed in building or inclosure.
- 3280. Property, how kept.
- 3281. Claim of property by third person.
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Section 3271. When Proceedings May be Had: The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him as provided in this Chapter.

1887 R. S. Sec. 4271.

Proceedings may be had on Sunday or holiday: Sec. 3017.

Defendant concealing or removing, may be arrested. Sec. 3245.

Parties interested in property may be brought in by order of the court by proper amendments: Sec. 3178.

Claim and delivery, tried by jury unless waived: Sec. 3454.

Verdict, form and requirements of: Sec. 3480.

Judgment, requirements of: Sec. 3505.

Execution: Sec. 3532, Sub. 5.

Execution issues to county where property or part of it situated: Sec. 3537.

Undertaking to supersede judgment on appeal to the supreme court and provisions for delivering documents or personal property to receiver or court in lieu thereof: Sec. 3577.

Justice's court, claim and delivery, undertaking required to stay execution: Sec. 3687.

PROPERTY MUST BE A PERSONAL CHATTEL: To support an action of claim and delivery, the property must be a personal chattel at the time of taking, and not something which has been turned into a chattel by reason of having been separated from the free hold by the defendant.—Hull v. Hull, 1 Idaho, 361.

CLAIM AND DELIVERY, WHEN MORTGAGEE MAY MAINTAIN: A mortgagee of personal property to whom delivery of mortgaged property has been made can maintain claim and delivery for the wrongful taking thereof by a third party.—O'Neil v. Whitcombe (Idaho), 32 Pac. 1133.

ACTION AGAINST TENANTS: An action for claim and delivery for a crop of grain raised on a tract of land can not be maintained against the tenants of one of the claimants of said land, where the title is in dispute, and said tenants are, and for several years have been, in the quiet and peaceable possession of said land, and have raised said crop.—Hull v. Hull, 1 Idaho, 361.

DETINUE, SUFFICIENCY OF COMPLAINT: Where in an action of detinue, the complaint alleges a wrongful taking of the property, the detention, the demand for damages for wrongfully withholding the same, an objection that it is not sufficient to support a judgment for plaintiff, will not be

sustained on appeal.—Crews v. Baird, 2 Idaho, 94, 6 Pac. 116.

SUFFICIENCY OF COMPLAINT, AIDER BY VERDICT: Where, in an action of claim and delivery, the evidence shows that the ownership of the property was the only issue, the allegation in the complaint that plaintiff was not the owner of and entitled to the property at the time of the commencement of the suit is sufficient after verdict.—Pierce v. Langdon, 2 Idaho, 878, 28 Pac. 401.

FAILURE TO PLEAD VALUE: If the property claimed be so mixed with other property, that a delivery of the specific article can not be made, and the plaintiff fails to ask judgment for its value, in case it can not be delivered, the action of claim and delivery can not be maintained.—Hull v. Hull, 1 Idaho, 361.

REPLEVIN, DEMAND, EVIDENCE: When demand for return of property is necessary, if made on deputy sheriff, who conducted sale of same under chattel mortgage foreclosure, it is sufficient to bind the sheriff. The allegations of complaint held sufficient to sustain action, and sufficiently sustained by evidence to warrant the verdict of the jury.—Dobbins v. Mounce (Idaho), 48 Pac. 1070.

PLEADING, NEW MATTER: When, in an action in claim and delivery for the recovery of personal property, the complaint alleges ownership and a right to the possession, the answer denying these allegations, it is not error in the court to allow the defendant to prove his right to the possession by virtue of a lien to defeat a recovery by plaintiff. The establishment of such right by defendant is not new matter required to be affirmatively pleaded.—Lindsay v. Wyatt, 1 Idaho, 738.

GENERAL DENIAL, PROOF OF FRAUD: Under general denial in replevin, defendant may prove fraud in the sale to plaintiff.—Cornwall v. Mix (Idaho), 34 Pac. 893.

MEASURE OF DAMAGES: Measure of damages in replevin is the value of property at the time of taking with value of its use from time of taking.—Cornwall v. Mix (Idaho), 34 Pac. 893.

MEASURE OF DAMAGES: In an action of claim and delivery where the property sought to be recovered is valuable for use aside from its intrinsic value and the prevailing party claims

damages for the loss of its use in the pleadings, the measure of damages is the value thereof, and a reasonable value of its use during the detention. In determining a reasonable value of its use, the taxes which the prevailing party would have paid, had he retained possession thereof, and the risk and ordinary use incident thereto should be considered.—*Sebree v. Smith*, 2 Idaho, 329, 16 Pac. 915.

STIPULATION AS TO DAMAGES:

In an action of claim and delivery it was stipulated by the parties, through their representative attorneys, that if plaintiff was entitled to recover at all he was entitled to recover the full value of the property or nothing. The jury found for the plaintiff in the sum of \$2500, the amount stipulated. The record showing that the plaintiff was clearly entitled to recover, held, that a verdict and judgment of \$2500 would not be disturbed.—*Mahoney v. Marshall*, 2 Idaho, 1174, 31 Pac. 809.

TRIAL, QUESTION FOR JURY: In an action of replevin it appeared that A., in the employ of defendant, and threatened with attachment suits, executed a bill of sale to defendant of certain mules; that on the following day, to effect a delivery, A. and defendant went to where the mules were in charge of plaintiff; that A., being indebted to the plaintiff, in the presence and with the acquiescence of defendant, sold to plaintiff by bill of sale and actual delivery five of the mules covered by defendant's conveyance; and that A. then made a delivery to defendant. Held that the question as to the ownership of the five mules was properly submitted to the jury.—*Lufkins v. Collins*, 2 Idaho, 234, 10 Pac. 300.

INSTRUCTIONS: Where, in an action of claim and delivery a court grants an instruction that "when property sold in good faith is at the time in the custody of a third person, notice to him of the sale is sufficient to constitute a delivery as to subsequent purchasers," the granting of another instruction that, "to constitute any such delivery it is necessary that the seller, purchaser and third party should all agree," is erroneous in that the two are inconsistent.—*Lufkins v. Collins*, 2 Idaho, 135, 7 Pac. 95.

PRACTICE, GENERAL VERDICT:

In an action of claim and delivery, a general verdict finding for or against either party is sufficient to enable the court to enter judgment thereon for the return of the property when such is an appropriate remedy.

SPECIAL FINDINGS OF VALUE:

In such actions, where several articles are sought to be recovered, if either party desire a finding of value of each

article, he should request that such findings be made or he can not take advantage of the failure to do so.

SPECIAL FINDINGS AS TO RETURN OF PROPERTY: In such cases if either party desires a finding for a return of the property, he should request such finding. If he fail to do so, he can not take advantage of the failure to make such finding.—*Johnson v. Fraser*, 2 Idaho, 371, 18 Pac. 48.

VERDICT, SUFFICIENCY: In an action of claim and delivery where the ownership or value of the property is put in issue, but defendant claims a lien upon the property for care and keeping of the same under the contract with plaintiff, a verdict that "defendant recover of and from the plaintiff the sum of \$679.50 for keeping and care of the cattle mentioned in the complaint, and that defendant had a lien on said cattle until said amount is paid," is sufficient, after judgment, under the statutes of Idaho.—*Blackfoot Stock Co. v. Delamue*, 2 Idaho, 1017, 29 Pac. 97.

JUDGMENT, INSUFFICIENT DESCRIPTION: In an action of claim and delivery, the description of property sought to be recovered simply as "590 sacks of wheat," held to be insufficient and a verdict and judgment which refers only to "the property described in the complaint," giving value, are fatally defective.—*Pierce v. Langdon*, 2 Idaho, 878, 28 Pac. 401.

THE JUDGMENT, FORM OF: The judgment of the court in an action of claim and delivery, when verdict is given for the defendant, should be in the alternative for the return of the property or its value. If the return can not be had, where such return is an appropriate remedy, the verdict need not be in the alternative.—*Johnson v. Fraser*, 2 Idaho, 371, 18 Pac. 48.

REPLEVIN, GROWING CROPS: No action lies to recover grain sown and harvested by one on lands to which he claimed the title and of which he was in the actual and adverse possession.—*Martin v. Thompson*, 62 Cal. 618, 45 Am. Rep. 663. While the owner may recover for use and occupation, he can in no case be held to be the owner of the crops grown and actually harvested on the land by the defendant while in possession.—*Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462.

The action lies to recover personal property annexed to the realty, where the parties intend that it shall retain its character as such.—*Hendy v. Dinkhoff*, 57 Cal. 3, 40 Am. Rep. 107.

DEMAND: If the original possession of property is acquired by a tort, no demand previous to the institution of a suit is necessary.—*Sargent v.*

Strum, 23 Cal. 359, 83 Am. Dec. 113. Where defendant claims ownership in himself by his answer, no demand is necessary.—Wells on Replevin, Sec. 374; Lotta v. Tutton, 122 Cal. 279, 54 Pac. 884, 68 Am. St. Rep. 30.

If the answer in replevin admits the value of the property averred in the complaint, evidence should not be admitted as to its value.—Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102.

Action to recover possession of personal property may be defeated by a showing that during the pendency of the action, and before a trial thereof, the defendant has been required to deliver, and has delivered, the property to a third person, entitled to its possession as against both plaintiff and defendant.—Bolander v. Gentry, 36 Cal. 105, 95 Am. Dec. 162.

RETURN OF PROPERTY, ALTERNATIVE VERDICT: In an action of claim and delivery, where the defendant demands a return of the property,

and the verdict of the jury, in favor of the defendant, is special as to the value of the property, and general upon all other issues, it is sufficient to justify an alternative judgment for the return of the property, or for its value, in case a delivery can not be had, and is not rendered defective because not specially finding in the alternative "for the return of the property."—Etchepare v. Aguirre, 91 Cal. 288, 27 Pac. 668, 25 Am. St. Rep. 180.

DESTRUCTION OF REPLEVIED PROPERTY BY ACT OF GOD PENDING ACTION: A plaintiff not being the owner of goods, who replevies them from the real owner, holds them in his own wrong and at his own risk, and when judgment is rendered against him for the return of the property or its value, he can not be excused from satisfying the judgment under a plea that the property has been lost in his hands, even by act of God.—De Thomas v. Witherby, 61 Cal. 92, 44 Am. Rep. 542.

Section 3272. Affidavit and its Requisite: Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, setting forth:

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof;
2. That the property is wrongfully detained by the defendant;
3. The alleged cause of the detention thereof, according to his best knowledge, information and belief;
4. That it has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized, under an execution or an attachment against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure.
5. The actual value of the property.

1887 R. S. Sec. 4272.

Affidavit of value not conclusive

against officer or sureties on undertaking: Sec. 3241.

Section 3273. Requisition to Sheriff to Take Property: The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant.

1887 R. S. Sec. 4273.

Section 3274. Security by Plaintiff and Service of Order: Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit,

if it be in the possession of the defendant or his agent, and retain it in his custody. He must, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or, if neither have any known place of abode, by putting them in the nearest postoffice, directed to the defendant.

1887 R. S. Sec. 4274.

Qualification of sureties: Sec. 3749.

Return of property to defendant, verdict for: Sec. 3480.

Judgment for: Sec. 3505.

Dismissal of action, clerk to deliver undertaking to defendant: Sec. 3499, Sub. 1.

Value stated in the affidavit is not

conclusive evidence against sheriff or sureties: Sec. 3241.

Undertaking exceeding \$2000, sureties may justify for less than whole amount: Sec. 3749.

State, county and officers are not required to give: Sec. 3750.

Statutory form applicable to all undertakings: Sec. 3752.

Section 3275. Exception to Sureties and Proceedings Thereon: The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next Section.

1887 R. S. Sec. 4275.

Justification of sureties: Sec. 3261.

Section 3276. Defendant, When Entitled to Redelivery: At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in Section 3281.

1887 R. S. Sec. 4276.

Section 3277. Justification of Defendant's Sureties: The defendant's sureties, upon notice to the plaintiff of not less than two or more than five days, must justify before the judge of the court or probate judge, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time. If they, or others in their

place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff.

1887 R. S. Sec. 4277.

Section 3278. Qualification of Sureties: The qualification of sureties must be such as are prescribed by this Code, in respect to bail upon an order of arrest.

1887 R. S. Sec. 4278.

Qualification and justification of sureties: Secs. 3260, 3261 and 3262.

Section 3279. Property Concealed in Building or Inclosure: If the property, or any part thereof, be concealed in a building or inclosure, the sheriff must publicly demand its delivery. If it be not delivered, he must cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

1887 R. S. Sec. 4279.

Section 3280. Property, How Kept: When the sheriff has taken property, as in this Chapter provided, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his fees for taking, and his necessary expenses for keeping, the same.

1887 R. S. Sec. 4280.

Section 3281. Claim of Property by Third Person: If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff is not bound to keep the property or deliver it to the plaintiff unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking by two sufficient sureties.

1887 R. S. Sec. 4281.

Section 3282. Notice and Affidavit. Return of Sheriff: The sheriff must file the notice, undertaking and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

1887 R. S. Sec. 4282.

CHAPTER CXXXIII.

INJUNCTIONS.

Section.

3283. Injunction defined. Who may grant.

3284. May be granted, when.

3285. When granted. Procedure required to obtain.

3286. Injunction after answer.

3287. Undertaking on injunction. Justification of sureties.

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3288. Order to show cause.

3289. Injunction to suspend business of a corporation.

3290. Restrictions upon injunction to restrain state officers.

3291. Motion to vacate injunction.

3292. When to be vacated or modified.

3293. Proceedings upon hearing of application on motion.

Section 3283. Injunction Defined. Who May Grant: An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof, and when made by a judge, it may be enforced as the order of the court.

1887 R. S. Sec. 4287.

Willson v. Boise City (Idaho), 60 Pac. 84.

May be granted at chambers: Secs. 3028 and 3033.

Proceedings may be had and writ served on Sunday or holiday: Sec. 3017.

In actions for nuisances: Sec. 3373.

May be issued to restrain party in possession during redemption period

after foreclosure or execution sale: Sec. 3385.

Suit stayed by injunction, effect on statute of limitations: Sec. 3148.

Enforced by serving certified copy, etc.: Sec. 3534.

Provisions for service by telegraph: Sec. 3717.

Injunction, appeal to supreme court from order in, within what time: Sec. 3573.

Section 3284. May be Granted, When: An injunction may be granted in the following cases:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff;

3. When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

4. When it appears, by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition;

5. An injunction may also be granted on the motion of the defendant upon filing a cross complaint, praying for affirmative relief upon any of the grounds mentioned above in this Section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff;

6. The district courts or any judge thereof sitting in chambers, in addition to the powers already possessed, shall have power to issue writs of injunction for affirmative relief having the force and effect of a writ of restitution, restoring any person or persons to the possession of any real property from the actual possession of which he or they may be ousted by force, or violence, or fraud, or stealth, or any combination thereof, or from which he or they are kept out of possession by threats whenever such possession was taken from him or them by entry of the adverse party on Sunday or a legal holiday, or in the night time, or while the party in possession was temporarily absent therefrom. The granting of such writ shall extend only to the right of possession under the facts of the case, in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions the same as though no such writ

had issued; *Provided*, That no such writ shall issue except upon notice in writing to the adverse party of at least five days of the time and place of making application therefor.

1887 R. S. Sec. 4288.

INJUNCTION, TAX PAYERS RESTRAINING ISSUE OF BONDS: A taxpayer, resident of the county, may sue to enjoin the issuance of funding bonds which are about to be issued for debts contracted in violation of the provisions of the constitution.—*Dunbar v. Board of Commissioners of Canyon County (Idaho)*, 49 Pac. 409.

REMOVING CLOUD FROM TITLE, ILLEGAL TAX: Injunction will lie to restrain the collection of an illegal tax where it creates a cloud upon the title of real estate.—*Bramwell v. Guheen*, 2 Idaho, 1069, 29 Pac. 110.

PLEADING, ALLEGATION OF FRAUD: A simple allegation of fraud and illegality in the action of a board of commissioners without the statement of any facts constituting the illegality, is insufficient.—*Picotte v. Watt*, 2 Idaho, 1154, 31 Pac. 805.

RESTRAINING REMOVAL OF COUNTY RECORDS: Citizens who are residents, electors and tax payers of a county may bring suit for injunction to prohibit the removal of the county records from a place alleged to be the county seat to a place claiming to be legally selected as the county seat of the county, and to test the legality of such selection when there is no speedy and adequate remedy at law.

Note: Chap. CLV provides a remedy for the contesting of elections of county seats and the removal of county seats.—*Doan v. Board of County Commissioners of Logan County*, 2 Idaho, 781, 26 Pac. 167.

PUBLIC NUISANCE, INJUNCTION, MAINTENANCE BY PRIVATE PARTY: Equity has jurisdiction to enjoin a public nuisance at the suit of private party, if such nuisance is especially injurious to such private party.

SAME, PLEADING: The complaint should set forth by positive averment, facts sufficient to show that the plaintiff has sustained special injury, different in kind from that sustained by the general public. Then the nuisance becomes as to him a private nuisance.

Section 3373 does not change the rule above stated as to private parties maintaining an action to abate a public nuisance.—*Redway v. Moore*, 2 Idaho, 1036, 29 Pac. 104.

MINING PARTNERSHIPS, CONTROL, INJUNCTION: Plaintiff is the owner of a seven-eighths interest in a placer mining claim and defendant is the owner of a one-eighth interest in the same claim. Held, that the plaintiff

has the right to control the means used and the methods adopted for working such mine and is entitled to an injunction to restrain such defendant from working such claim except in the manner directed by plaintiff.—*Hawkins v. Spokane Hydraulic Mining Co.* 2 Idaho, 970, 28 Pac. 433.

LANDLORD AND TENANT, RIGHTS OF SUBTENANT, INJUNCTION: In an action to enjoin defendants from interfering with the removal from his premises of certain wood, the property of plaintiffs, it appeared that L. with defendant's consent, had placed the wood in question upon defendant's land; that subsequently L. leased the land from defendant covenanting not to sublet any part of it without defendant's consent; that soon after the execution of the lease L. sold the wood to plaintiffs, by the terms of the sale giving them until the expiration of the lease to remove the wood, and that plaintiffs knew of the terms of L.'s lease. Held, that the overruling of the demurrer to the complaint was error. Breoderick, J. dissenting.—*Aveline v. Ridenbaugh*, 2 Idaho, 154, 9 Pac. 601.

ENJOINING ACTION AT LAW: A defendant may not, under the Code, bring his separate suit in equity to enjoin the original action at law, when his complaint consists of matter defensive to such original action.—*Utah & N. R. Co. v. Crawford*, 1 Idaho, 770.

ACTION, RIGHT TO INSTITUTE: A person can not be prohibited from bringing an action to test his right to property, by a restraining order of the court in which such right has been adjudged against him in an action to which he was not a party.—*Ray v. Ray*, 1 Idaho, 566.

RESTRAINING SALE AND SETTING ASIDE DECREE: For the sake of harmonizing the practice in legal and equitable cases, and to give effect to the spirit of our Code, we incline to the opinion that the practice is, to proceed against a decree in order to annul or set it aside, in the same manner as against a judgment entered in a court of law.—*Oro Fino and Morning Star Mining Company v. Cullen et al.* 1 Idaho, 113.

INJUNCTION, GROUNDS, APPREHENSION OF IMMEDIATE INJURY: Where a party seeks relief by interlocutory injunction, he should show some clear legal or equitable right and an apprehension of immediate injury to those rights; where none such are shown, an injunction will be denied,

SAME, PROPERTY RIGHTS INVADED: Courts of equity will not interfere by injunction to prevent the commission of crime where no property rights are invaded.—*McGinnis v. Friedman*, 2 Idaho, 361, 17 Pac. 635.

EQUITY, ADEQUATE REMEDY AT LAW: Where, in an act to enjoin a railroad company from entering upon plaintiff's right of way and from further constructing its railroad thereon and from further interfering with plaintiff's occupancy thereof, and praying that the title thereto be decreed to be in the plaintiff as against the defendant, it appears that defendant has completed its road over the property in dispute and is in the actual use and possession thereof, the court should not pass upon the title, but should leave plaintiff to his remedy at law. *Berry, J. dissenting.*—*Washington & I. R. R. Co. v. Coeur d'Alene R. R. & Nav. Co.* 2 Idaho, 544, 21 Pac. 562.

EQUITY, JURISDICTION, REMEDY AT LAW: When the statute provides a plain, speedy and adequate remedy, it must be pursued. The fact that such a proceeding imposed a great inconvenience, can not be urged as a reason for the interposition of equity.—*Picotte v. Watt*, 2 Idaho, 1154, 31 Pac. 805.

For case where injunction denied upon particular facts, see *McCarty v. Boise City Canal Co.* 2 Idaho, 225, 10 Pac. 623.

INJUNCTION, LABOR UNIONS, INTERFERENCE WITH EMPLOYEES: An injunction may be granted to restrain labor unions and members thereof from entering upon complainant's mines, or interfering with the working thereof, or by force, threats, or intimidation, preventing complainant's employes from working the mines, where the threatened acts are such that their frequent occurrence may be expected, and defendants are insolvent.

SAME, RESTRAINING TRESPASS TO REALTY: The rule that a trespass can not be enjoined unless on realty, and where the damage is irreparable, and after the right or title involved has been established at law, does not apply to such a case, as no title to realty is involved, and the acts complained of are not a direct trespass to realty, but only indirectly affect the enjoyment of property and other rights.

SAME, RESTRAINING CRIMINAL ACTS: Neither does the rule that equity will not interfere for the prevention of crime, apply, the acts done or threatened not being criminal, though unlawful, and such as may lead to the commission of criminal acts.

SAME, EVIDENCE, GOVERNOR'S PROCLAMATION: On the question of

continuing such an injunction pending the suit, statements supporting complainant's allegations, contained in a proclamation by the governor of the state, which is part of the record in the case, made by him after personal investigation of the facts, may be considered.

SAME, GOOD FAITH OF COMPLAINANT: An allegation by complainant that defendants' interference had compelled a former suspension of work, for which, at the time, complainant gave a different reason, does not show such bad faith as to justify a dissolution of the injunction where, so far as appears, both causes may have induced the suspension.

SAME, COMPLAINANT MEMBER OF ILLEGAL ASSOCIATION: The fact that complainant is a member of an association which is alleged to be illegal, is no ground for refusing to entertain its suit, instituted in its own name, and for its own interest, and not appearing to be the direct result or a part of any illegal association, scheme, or conspiracy.—*Coeur d'Alene Consolidated & Mining Co. v. Miners' Union of Wardner*, 51 Fed. Rep. 260.

PUBLIC LANDS, COURTS, ENJOINING PUBLIC OFFICERS: The officers or agents of the interior department may be enjoined from unlawfully ejecting a person having a vested right to the possession of lands. (In equity.)—*Caldwell v. Robinson*, 59 Fed. Rep. 653.

INJUNCTION, TAXATION: The following cases hold that in all cases involving simply the question of taxation, the issue is strictly one at common law; and courts of equity can take no cognizance thereof; and in such case to grant an injunction, is error.—*Minturn v. Hays*, 2 Cal. 590, 56 Am. Dec. 366. As to where illegal proceedings create no cloud on title.—*De Witt v. Hays*, 2 Cal. 463, 56 Am. Dec. 352. Unless it appears that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, and the sale casts a cloud upon the title of complainant.—46 Cal. 416; see also 22 L. R. A. 699.

INJUNCTIONS BY MUNICIPAL CORPORATIONS: Against nuisances affecting public morals, peace and good order, health and safety: See note 41 L. R. A. pages 321 to 330.

Against nuisances in waters and watercourses: See note 40 L. R. A. pages 465 to 470.

Against nuisances upon highways and streets: See note 42 L. R. A. pages 814 to 825.

Against nuisances by railroads and

electrical companies: See note 44 L. R. A. pages 565 to 579.

Electric light company will not be restrained at suit of owner of abutting lot from erecting pole in alley where it does not seriously interfere with access to property or with the light or air to it. A pole used for electric light purposes is within an urban servitude, where it appears that the pole in question is intended to serve public interests.—*Loeber v. Butte General Electric Company*, 16 Mont. 1, 39 Pac. 912, 50 Am. St. Rep. 468.

PURPRESTURES, INJUNCTION: A purpresture exists where one incloses or makes several to himself that which ought to be common to many. If it unlawfully obstructs the free passage or use in the customary manner by the public, it is a nuisance, and may be abated as such by a court of equity; if it falls short of this, the remedy is not by the people who are not injured, but by the holder of the legal title.—*People v. Park and Ocean R. R. Co.* 76 Cal. 156, 18 Pac. 141, as to remedies for their abatement generally see extended note 69 Am. St. Rep. pages 271 to 281.

RESTRAINING VIOLATIONS OF TRUST RELATIONS: Injunction will lie to restrain an agent who has procured a lease to himself, in violation of his fiduciary relations to his principal, from proceeding to recover the premises pending suit to compel a transfer of the lease to the principal.—*Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242. pledgee of corporate stock may be restrained by injunction from illegally procuring transfer upon books of the corporation to his name before the maturity of the secured debt.—*Spreckles v. Nevada Bank of San Francisco*, 113 Cal. 272, 45 Pac. 329, 54 Am. St. Rep. 348.

RESTRAINING INFRINGEMENT OF TRADE NAME, ETC.: Injunction will lie to prevent fraudulent assumption of a trade name in such a way as to induce persons to deal with the defendant in the belief that they are dealing with plaintiff who has given a reputation to the name.—*Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57. Injunction will not lie to enjoin a defendant from engaging in business contrary to the terms of void contract in restraint of trade.—*Merchants Ad. Sign Co. v. Sterling*, 124 Cal. 429, 57 Pac. 468, 71 Am. St. Rep. 94. Discharged employee assuming to act as partner, and without right intruding upon the business premises, interfering with the owner's affairs, intercepting money, etc., may be enjoined from continuing such conduct, especially when he is admittedly insolvent.—*De Groot v. Peters*, 124 Cal. 406, 57 Pac. 209, 71 Am. St. Rep. 91.

Injunctions to restrain waste generally: See note 11 L. R. A. 207.

Where a bill avers that plaintiffs are the owners and in possession of a tract of land, that defendants are insolvent and threaten to and will, enter upon said land, and by excavations, embankments, and diverting valuable springs and streams thereon, despoil it of its substance of the inheritance, and create a cloud upon plaintiff's title, injunction lies.—*Bensley v. Mountain Lake Water Co.* 13 Cal. 307, 73 Am. Dec. 575.

Injunction to prevent the revocation of a license to build a levee on the lands of another will be granted, when acting under such license, the licensee has constructed such levee, and it is necessary to protect his lands from overflow; and the removal or destruction of such levee will also be enjoined. In cases where the revocation would be a fraud, courts of equity give a remedy, either by restraining the revocation, or by construing the license as an agreement to give the right, and compelling specific performance.—*Grimshaw v. Belcher*, 88 Cal. 217, 26 Pac. 84, 22 Am. St. Rep. 298.

An injunction will not be granted to restrain the removal of a house on mortgaged land, unless the land, without the house, will be an inadequate security for the mortgage debt.—*Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90.

Injunction against trespass to cut timber: See note 22 L. R. A. 233.

INJUNCTION, TRESPASSER: An injunction will lie in favor of a trustee of a hunting club, which has an exclusive right of hunting upon a game preserve under lease from the owner to the trustee, to restrain hunting thereupon by trespassers without right.—*Kellogg v. King*, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74.

MINES AND MINING: A writ of injunction will lie, to restrain trespass, in entering upon a mining claim, and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. It comports more with justice to both parties to restrain the trespass, than to leave the plaintiff to his remedy at law.—*Merced Mining Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262. An injunction lies to restrain the depositing dump and refuse matter from upper mining claim on plaintiff's claim where it renders the working of his ground impracticable.—*Logan v. Driscoll*, 19 Cal. 623, 81 Am. Dec. 90. Where debris is deposited upon the lands of the plaintiff by means of different ditches constructed and operated by different defendants, between whom there was no concert of action, a joint action may be maintained to enjoin them all from con-

tinuing the wrong, but a joint judgment for damages in such action is erroneous, and will be reversed.—*Miller v. Highland Ditch Co.* 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254. One of several tenants in common of a mine, who does not exclude his cotenants, may work the mine in the usual way, and extract ore therefrom, without being chargeable for waste, or liable to the other cotenants for damages, and an injunction will not be granted at their instance to prevent the working of the mine.—*McCord v. Oakland Quicksilver Mining Co.* 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686. Those owning the major portion of a mining claim have the power to decide what may be necessary and proper for carrying on the business of mining, and an injunction will not lie to restrain the working of the claim provided that the exercise of such power is necessary and proper for the carrying on the enterprise for the benefit of all concerned.—*Dougherty v. Creary*, 30 Cal. 290, 89 Am. Dec. 116.

INJUNCTION, TRESPASSES FOUNDATION OF EQUITY JURISDICTION: The foundation of the jurisdiction of a court of equity to issue injunctions to restrain trespasses is the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits. A complaint upon the ground of irreparable injury must show affirmatively facts which will justify that conclusion. In a complaint to restrain the construction of a ditch across barren and comparatively valueless land, and the laying of pipes therein, an allegation that the trespass will ripen into an easement unless enjoined, forms no basis for injunctive relief pending the final hearing.

If the granting of an injunction would necessarily cause great loss to the defendant, a loss disproportionate to the injuries sustained by the plaintiff, the fact should be considered in determining whether the application should be granted, and, in some cases, it would justly have great weight.—*McGregor v. Silver King Mining Co.* 14 Utah, 47, 45 Pac. 1091, 60 Am. St. Rep. 883.

In an action to restrain the laying of pipe line across worthless, uncultivated and unused land of another, and it appearing that the restraining of the laying of the pipe would cause irreparable injury to the mine owner and destroy large industries without any material benefit to plaintiff, held that the facts present no matter requiring equitable relief; that the remedy at law is adequate to do full justice and that the court should refuse to issue

the injunction as not within its legitimate jurisdiction.—*Crescent Mining Co. v. Silver King Mining Co.* 17 Utah, 444, 54 Pac. 244, 70 Am. St. Rep. 810.

WATER RIGHTS AND IRRIGATION: An upper proprietor and junior appropriator will not be enjoined from diverting a certain amount of the waters of a creek for irrigation purposes, when it appears that such creek is not a running stream during the irrigation season, and that during such season none of the waters flowing in such creek at his point of diversion can in the course of its natural flow reach plaintiff's ranch fifteen miles below.—*Raymond v. Wimsette*, 12 Mont. 551, 31 Pac. 537, 33 Am. St. Rep. 604. Riparian proprietor is entitled to injunction restraining unlawful diversions of water of stream, although the injury caused by the diversion of the stream is incapable of ascertainment, or of being computed in damages. Riparian proprietor can not authorize corporation to take water from a stream, to be conducted to a distance and there sold as against a lower proprietor.—*Heilbron v. Fowler Switch Canal Co.* 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183.

DAM OBSTRUCTIONS: A dam was constructed on a stream in a manner in nowise injurious or prejudicial, at the time of its erection, to a mill owner above; but, by reason of the unusual and unprecedented inflow of waters from the working of mines located on the stream above the mill, the obstruction became so great as to prevent the regular and efficient operation of the mill. Held, that the owner of the dam was not responsible for the injury thus occasioned and that an injunction would not lie compelling him to lower the dam. *Proctor v. Jennings*, 6, Nev. 83, 3 Am. St. Rep. 240. In an action to restrain the obstruction of a stream by a dam impounding sawlogs for the use of a mill and from polluting the stream by discoloration from the logs, and by waste matter from the saw mill and the escape of offal into the stream from privies, etc., where the court finds that the bed of the stream is private property and that the water was not polluted to such a degree by any or all of the matters complained of as to render it unfit for use or unwholesome, and the evidence shows that the source of the alleged pollution, other than the discoloration from the logs, were not over or immediately upon the banks of the stream, the court may properly refuse to enjoin the acts complained of. The people employed at a saw mill, comprising a portion of the public, have as much right to live near the banks of a stream as the in-

habitants of any community on the stream below them, if they take all reasonable precautions against unnecessarily polluting the water, and inhabitants and property owners upon the stream can not be compelled to remove or be expropriated for the benefit of urban communities.—*People v. Elk River M. & L. Co.* 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125.

Injunctions to protect water rights generally, navigable streams: See note 3 L. R. A. 609; *State of California v. Gold Run Ditch and Mining Co.* 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80, note pages 89 to 100.

INJUNCTIONS RESTRAINING LEGAL PROCEEDINGS: A party to an action in one court can not bring suit for injunction in another court of co-ordinate jurisdiction to restrain the decree of the former court.—*Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304.

ENJOINING JUDGMENT: A defendant, having no defense to an action, can not go into equity and enjoin a judgment by default, on the ground that the sheriff's return is false, and that in fact that he had no notice of the proceeding. Equity interferes with judgments and proceedings at law, only in peculiar cases, not to correct errors and irregularities. It seldom or never interferes to enforce a mere technical right. There must be substantial merit.—*Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639 and note; see also note, 30 L. R. A. 700-712. A mortgagor having made default in a foreclosure suit upon the faith of an agreement of the mortgagee not to take deficiency judgment against him, but being without legal defense can not enjoin the enforcement of the deficiency judgment, docketed against him in violation of the agreement, the same being without consideration.—*Heim v. Butin*, 109 Cal. 500, 42 Pac. 138, 50 Am. St. Rep. 54. General equitable jurisdiction in regard to injunctions against judgments.—Note 32 L. R. A. pages 321 to 329.

RESTRAINING EXECUTION: An injunction will not lie to restrain the enforcement of an execution issued on a judgment by default in a justices court, which is void on its face for the reason that the court never acquired any jurisdiction of the person of the defendant. In such a case, the defendant has an adequate remedy at law, by motion in the justice's court, to set aside the execution.—*Luco v. Brown*, 73 Cal. 3, 14 Pac. 366, 2 Am. St. Rep. 772; against void judgments generally see 31 L. R. A. 200 et seq.

Against judgments obtained by fraud, accident, mistake, surprise and duress.

—*Merriman v. Walton*, 105 Cal. 403, 30 L. R. A. 786, and note 786-802.

Against judgments for defenses existing prior to their rendition: See note 31 L. R. A. 747 to 775.

Against judgments for matters arising subsequent to their rendition: Note 30 L. R. A. 560-573.

Against judgment entered on confession: See note 31 L. R. A. 59-66.

Against judgment in garnishment proceedings: See note 31 L. R. A. 360-363.

Against garnishment in other states: See note 19 L. R. A. 577-580.

Against suit in foreign jurisdiction. See note 21 L. R. A. 71-75.

Injunction against execution sales or other proceedings under final process.—*Parsons v. Hartman*, 25 Or. 547, 37 Pac. 61, 30 L. R. A. 98 and extended note, pages 98 to 143.

ENJOINING SALE: A sheriff may be enjoined from selling real property belonging to the wife, under an execution against the husband.—*Alverson v. Jones*, 10 Cal. 9, 70 Am. Dec. 689.

SALE UNDER EXECUTION IN VIOLATION OF INJUNCTION: The issuing of an execution and the sale of real property during the existence of a preliminary injunction restraining the same, renders the sale voidable, and the execution and sale may, upon proper proceedings taken, be set aside. Such sale is not, however, void, and a deed made under it conveys a valid title.—*Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256.

Where a sheriff has levied on and is about to sell property of an execution debtor, and the defendant in execution obtains from the court in which the judgment was rendered an injunction restraining the plaintiff in the judgment, his servants, etc., from proceeding to sell under such execution, and this injunction is served upon the sheriff, who in defiance of it afterwards makes the sale, he is a naked trespasser, and liable in damages, even though he be not a party to the injunction suit.—*Buffandeau v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 139.

INJUNCTION IN AID OF ATTACHMENT: If the attachment creates a lien upon the property attached the attaching creditor is entitled to protect his lien by injunction.—*Schuster v. Rader*, 13 Colo. 329; *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519, and note 20 L. R. A. 446.

An injunction for the purpose of protecting property during litigation will not be allowed, where the complaint shows that the party seeking the injunction has no title to, or interest in, the property, and no claim to the ulti-

mate relief sought by the litigation.—*State of California v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118.

INJUNCTION, JURY TO DETERMINE WHAT ISSUES: Where equitable relief sought by injunction is ancillary to, and dependent upon, the legal issues involved in the case, the parties may claim a jury to determine such issues, and the injunction can

only be granted when the verdict is in his favor who claims equitable relief.—*Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550.

As to the power of the court to grant mandatory injunctions: See note 20 L. R. A. pages 161 to 169, and note 20 Am. Dec. pages 389 to 402; *Staples et al. v. Rossi et al.* (Idaho), 65 Pac. 67.

Section 3285. When Granted, Procedure Required to Obtain: The injunction may be granted at the time of issuing the summons, upon the complaint, and at any time afterwards, before judgment, upon affidavits. The complaint in the one case, and the affidavits in the other must show satisfactorily that sufficient grounds exist therefor. No injunction can be granted on the complaint unless it is verified. When the application is upon notice or order to show cause, a copy of the moving papers must be served with the notice or order; when granted without notice a copy of the moving papers must be served with the injunction.

1887 R. S. Sec. 4289.

ISSUING INJUNCTION: The plaintiff in an action is entitled to an injunction at the time of issuing the summons upon the complaint alone, if it makes a proper case and is verified properly; but if he asks for an injunction thereafter, he must do so upon affidavits.—*Falkinburg v. Lucy*, 35 Cal. 52, 95 Am. Dec. 76.

Appellate court will not reverse or modify action of court below in granting or continuing a preliminary injunction, except in case of palpable error or abuse of discretion.—*Patterson v. Board of Supervisors*, 50 Cal. 344; *Efford v. Railroad Co.* 52 Cal. 279; *Bigelow v. Los Angeles*, 85 Cal. 614, 24 Pac. 778; *Washington & I. R. Co. v. Coeur d'Alene Ry. & Nav. Co.* 2 Idaho, 405, 17 Pac. 142.

Section 3286. Injunction After Answer: An injunction cannot be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

1887 R. S. Sec. 4290.

Section 3287. Undertaking on Injunction, Justification of Sureties: On granting an injunction, the court or judge must require, except when the State, a county, or municipal corporation, or a married woman in a suit against her husband, is a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties to the effect that the plaintiff will pay to the party enjoined such costs, damages and reasonable counsel fees, not exceeding an amount to be specified, as such party may incur or sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto. Within five days after the service of the injunction, the defendant may except to the sufficiency of the sureties. If he fails to do so he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two or more than five days, must justify before the judge or a probate judge, in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved.

1887 R. S. Sec. 4291.

Dismissal of action. Clerk to hand undertaking to defendant: Sec. 3199, Sub. 1.

Qualifications of sureties: Sec. 3749.

Justification: Sec. 3261.

SUFFICIENCY OF UNDERTAKING: An undertaking for an injunction is sufficient without the signature of the plaintiff in the action.—Pence v. Derbin, 1 Idaho, 550.

LIABILITIES OF SURETIES: The fixing of the sum of one thousand dollars between the signature and seal of the obligor to a bond, the penalty of which is two thousand dollars, will not have the effect to limit his liability to one thousand dollars.—Dangel v. Levy, 1 Idaho, 722.

JUSTIFICATION OF SURETIES:

Under our statute in a bond or undertaking for an injunction for two thousand dollars or less, a surety can not justify in a sum less than that named as a penalty in the bond or undertaking.—Dangel v. Levy, 1 Idaho, 722.

ALTERATION OF BOND, FRAUD: When, in an undertaking for two thousand dollars, the figures one thousand dollars enter between the signature and seal of one of the sureties were erased after it was signed by him, this was no fraud upon another surety who signed

the undertaking after the erasure.—Dangel v. Levy, 1 Idaho, 722.

ERASURE IN UNDERTAKING: Where an undertaking for an injunction was executed and delivered after an erasure had been made, it can not be presumed that the obligee was a party to such alteration or erasure.—Dangel v. Levy, 1 Idaho, 722.

INJUNCTION BOND, LIABILITY OF SURETIES: The sureties on an injunction bond are entitled to stand upon the precise terms of their contract; and when a bond is given in pursuance of an order that an injunction issue upon the filing of the bond, the sureties are not liable for damages arising to the defendant from his obedience to a writ of injunction issued several days prior to the date of the bond, no writ having issued after the filing of the undertaking.—Carter v. Mulrein, 82 Cal. 167, 22 Pac. 1086, 16 Am. St. Rep. 99. And where the damages are limited by the terms of the bond to such as the plaintiff may sustain by reason of the injunction, whatever expenses he is subjected to by reason of the suit, or for counsel fees in defending the suit, are not damages within the terms of the bond.—Curtiss v. Bachman, 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111.

Section 3288. Order to Show Cause: If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

1887 R. S. Sec. 4292.

A restraining order pending an order to show cause why an injunction should not be issued, and until the further order of the court, is only authorized to be made pending the motion for an injunction, and where there is no appearance at the time when the order to

show cause was returnable, and the motion for an injunction was not completed nor kept alive in any mode, the restraining order falls, and ends naturally with the motion.—San Diego Water Company v. Pacific Coast Steamship Co. 101 Cal. 216, 35 Pac. 651.

Section 3289. Injunction to Suspend Business of a Corporation: An injunction to suspend the general and ordinary business of a corporation cannot be granted except by the court or judge thereof; nor can it be granted without due notice of the application therefor to the proper officers or agent of the corporation, except when the people of this State are a party to the proceeding.

1887 R. S. Sec. 4293.

Where the general and ordinary business of a corporation is "buying and selling mining claims or in working them," an injunction which restrains the mining operations of the corporation in a particular manner, alleged to be to the injury of others, does not sus-

pend the general and ordinary business of the corporation within the meaning of the section.—Golden Gate M. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628; see also Fischer v. Superior Court, 119 Cal. 129, 42 Pac. 561; Willson v. Boise City (Idaho), 69 Pac. 84.

Section 3290. Restrictions upon Injunction to Restrain State Officers: Where a duty is imposed by statute upon a State officer or officers, an injunction to restrain him or them, or a person employed by him or them, from the performance of that duty, or to prevent the execution of the statute, shall not be granted, except by the district court, sitting in the county in which the officer or officers are located, or the duty is required to be performed; and upon notice of the application therefor to the officer, or officers, or other person to be restrained.

1887 R. S. Sec. 4294.

Section 3291. Motion to Vacate Injunction: If an injunction be granted without notice, the defendant, at any time before the trial, may apply to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or the answer or upon affidavit on the part of the defendant, with or without the answer. If the application be made upon affidavits on the part of the defendant, it must be upon reasonable notice to the plaintiff, and in that case, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the injunction was granted.

1887 R. S. Sec. 4295.

INJUNCTION, BOND, POWER OF COURT ON DISSOLUTION, JUDGMENT AGAINST SURETIES: A court of equity, on the dissolution of an injunction, may under its general powers, and in the absence of statutory provisions, have the damages occasioned by its issuance assessed under its own direction, and may render judgment therefor against the sureties as an incident to the principal suit.

SAME, RELEASE OF SURETIES, MODIFICATION OF INJUNCTION: Under the rule that the liability of a surety can not be extended by implication beyond the express terms of his contract, sureties on a bond given to procure a restraining order, which order required the defendants to cease working a certain portion of a mine, and to refrain from removing or appropriating ore previously taken therefrom, can not be held liable for damages accruing to defendants after a subsequent order, which continued such restraining order in force, but modified and changed it by permitting the working of the mine, and the disposition of the ore taken therefrom, under regulations prescribed by the court.

SAME, DAMAGES RECOVERABLE: In a suit to enjoin defendant from the further working of a mine beyond the alleged limits of its claim, in which a temporary injunction was allowed, and by a subsequent order the

court required the defendant to pump the water from its workings to permit an inspection by complainant's engineers, the complainant is liable on its bond, on a final determination of the suit in favor of defendant, for the cost of such pumping, though continued much longer than was necessary for the making of the inspection, where such continuance was solely by reason of the order, and the complainant itself delayed the examination, and took no steps to have the work stopped. (Appeal from Circuit Ct. U. S. for Dist. Idaho.)—Tyler Min. Co. v. Last Chance Min. Co. 90 Fed. Rep. 15.

DISSOLVING INJUNCTION: Where an injunction has been granted without notice to the defendant, he may move to dissolve, first, upon the papers, whatever they may have been, upon which it was granted; or, second, upon the papers upon which it was granted, and affidavits on the part of the defendant, with or without the answer.

If the defendant rests his motion on the papers upon which the injunction was granted, the plaintiff can make no further showing, but must stand upon his complaint, or his complaint and affidavits, as the case may be; but if the defendant makes a counter showing, by affidavits, with or without answer, the plaintiff may meet it with a further showing on his part.

If the defendant, moving to dissolve an injunction, uses his verified answer

for that purpose he makes an affidavit in the sense required by statute for all the purposes of his motion; and, as in the case of his use of affidavits for that

purpose, without the answer, the plaintiff is equally entitled to reply by way of affidavits on his part.—*Falkinburg v. Lucy*, 35 Cal. 52, 95 Am. Dec. 76.

Section 3292. When to be Vacated or Modified:

If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it must be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it must be modified.

1887 R. S. Sec. 4296.

A party denying the allegations of a bill in equity, and desiring to procure the dissolution of an injunction, on the ground of having denied the equities of such bill, must controvert directly every material allegation of such bill; he must not undertake to set up new facts, must not confess and avoid; it must simply be a plain, direct, unequivocal denial.—*Oro Fino and Morning Star Mining Company v. Cullen*, 1 Idaho, 113.

When the whole equity of the complaint is denied by the answer, the defendant is entitled to a dissolution of the injunction pendente lite, until the

plaintiff's title is established by proper evidence on the hearing of the cause. But to have this effect the denial of such equities must be full and specific and must cover the whole ground. If facts are admitted which qualify a general denial; if the denials be evasively made, or if, on examination of the circumstances the court deemed that the facts warranted the continuance of the injunction, notwithstanding a formal denial may have been made, the rule will not apply.—*Oro Fino and Morning Star Mining Company v. Cullen*, 1 Idaho, 113.

Section 3293. Proceedings upon Hearing of Application on Motion:

Upon the hearing of an application for an injunction upon notice to the adverse party, or upon return of an order to show cause why an injunction should not be granted, or upon an application to dissolve or modify an injunction granted without notice, where the injunction was granted or is applied for wholly or in part upon affidavits, the party resisting the application or moving to dissolve the injunction may by three days' written notice require the adverse party to produce at the hearing for cross examination before the court or judge, the affiants of the affidavits upon which he relies for the injunction, or to resist the application for its dissolution; and any party so requiring his adverse party to produce his witnesses at such hearing must himself produce for cross examination, the witnesses upon whom he relies upon such hearing; and either party may have the same process, to secure the attendance of witnesses at such hearing as upon trial of issue of fact in the district court; and in such case, where the attendance of witnesses shall have been so required, no affidavit shall be read or considered by the court or judge upon such hearing unless the affiant is so produced for cross examination, *Provided*, That the court or judge may, at the conclusion of the examination of the witnesses produced by the respective parties, for good cause shown, adjourn the hearing to enable either party to secure the attendance of an absent affiant, or may direct his examination to be taken in writing before such officer and at such time and place as the court or judge may designate. The examination of any witness produced before the court or judge must, upon request of either party, be reduced to writing, subscribed by the affiant, certified by the judge and filed in the action, and with any examination taken in compliance with the order of the court or judge, be made

a part of the record upon appeal in the same manner as affidavits are made a part of such record.

1887 R. S. Sec. 4297.

COST IN INJUNCTION PROCEEDINGS: Where an order to show cause why an injunction should not issue is apparently heard by consent or agreement of parties, without any attempt to comply with the provisions of the statute in relation thereto, the prevailing party is entitled to recover disbursements actually and necessarily made in preparing for such hearing, including

the cost of procuring witnesses; and where, on an appeal from an order made upon such hearing, an appeal is taken, the prevailing party being the appellant, he is entitled to tax in his costs the amount paid by him to procure a copy of the evidence from the court stenographer.—*Raft River Land & Cattle Co. v. Langford* (Idaho), 51 Pac. 1027; *Maydole v. Watson et al.* (Idaho), 60 Pac. 86.

CHAPTER CXXXIV.

ATTACHMENTS.

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ISSUANCE AND SERVICE.

Section 3294. Attachment, When and in What Cases May Issue: The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gave security to pay such judgment, as in this Chapter provided, in the following cases:

1. In an action upon a judgment, or upon contract, express or implied, for the direct payment of money, where the contract is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property; or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless;

2. In an action upon a judgment or upon contract, express or implied, against a defendant not residing in this State.

1887 R. S. Sec. 4302.

Proceedings may be had on Sunday or holiday: Sec. 3017.

UNITING ASSIGNED CLAIMS WITH SECURED CLAIMS: Where plaintiff has procured by assignment, a few days prior to commencing his suit, two small claims against defendant, which claims were unsecured, the plaintiff can not, by uniting such claims with his secured claims in his complaint, secure the benefit of the attachment for any portion of the claims sued for. — *Willman v. Friedman* (Idaho), 35 Pac. 37.

SECURITY SURRENDERED TO DEFENDANT: A plaintiff, who at one time held real estate as security for money furnished to the defendant; but who afterwards delivers the real estate to defendant, who receives it, is entitled to an attachment, when suing for his debt. — *Wooddy v. Jamieson* (Idaho), 40 Pac. 61.

SECURITY, EXECUTORY LAND CONTRACT: Where W. sold to F. certain real estate upon executory contract, F. going into possession, but title remaining in W., until purchase price is paid by vendee, vendor has such a lien as bars him from resorting to attachment, under the statutes of Idaho, for the recovery of the unpaid portion of purchase price. — *William v. Friedman* (Idaho), 35 Pac. 37.

Section 3295. Affidavit for Attachment, What to Contain: The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of plaintiff, setting forth:

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter-claims) and whether upon a judgment or upon a contract, for the direct payment of money, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; or,

2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter-claims) and that the defendant is a non-resident of the State; and

3. That the attachment is not sought, and the action is not prosecuted to hinder, delay or defraud any creditor of the defendant.

1887 R. S. Sec. 4303.

ATTACHMENT, DEFECTIVE AFFIDAVIT, EFFECT: If an affidavit for an attachment is defective in not stating all the statute requires, or if it is false, the court has no jurisdiction to

ATTACHMENT, VALIDITY OF WRIT: A writ of attachment under the reformed procedure is purely a creature of statute, and if issued in an action not based upon a contract express or implied is void, and may be collaterally attacked and if issued in an action sounding in tort confers no jurisdiction in rem over the property of a non-resident defendant who is served with summons by publication. — *Mudge v. Steinhart*, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17.

ATTACHMENT, ACTION AGAINST STOCKHOLDER: An action against a stockholder of a corporation to recover his proportion of a debt of the corporation is an action upon a contract within the meaning of this section. — *Kennedy v. The California Savings Bank*, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163.

Attachment on debt not due is void as against creditors whose rights are injuriously affected by it. Otherwise if debt equitably due. — *Davis v. Eppinger*, 18 Cal. 379, 79 Am. Dec. 184.

A pledge of personal property is a mortgage within the meaning of the statute on attachments. — *Payne v. Bensley*, 8 Cal. 260, 68 Am. Dec. 318.

Damages for wrongful or malicious attachment: See note 68 Am. St. Rep. 266-280.

Actions for and defenses thereto: See note 81 Am. Dec. 467-480.

issue the attachment. — *Murphy v. Montandon*, 2 Idaho, 407, 29 Pac. 851.

SEVERAL CAUSES OF ACTION. AFFIDAVIT REFERRING TO ONE ONLY: V. sues S. on two causes of action, and procured an attachment,

The affidavit for attachment stated that the note upon which the second cause of action was based had not been secured by mortgage, etc. On motion to dissolve the attachment it was shown that the note sued on in the second cause of action was secured by mortgage. The trial court dissolved the attachment in toto. Held, that the writ of attachment being an entirety, and the affidavit failing to state the facts required by the statute as to the one cause of action, jurisdiction to issue it will not exist, and it was properly dissolved.—Sullivan, C. J. dissenting.—Vollmer v. Spencer (Idaho), 51 Pac. 609; Murphy v. Montandon, 2 Idaho, 407, 29 Pac. 851; Willman v. Friedman (Idaho), 35 Pac. 37; Fisk v. French (Colo.), 46 Pac. 161.

SIGNATURE OF AFFIANT: Where the affidavit in attachment purports to have been duly sworn to before a proper officer, and the name of the affiant appears in the commencement of the affidavit as "A. B. being duly sworn, etc., the affidavit will be held sufficient, although the signature of the affiant

does not appear thereon.—Simmons Hardware Co. v. Alturas Commercial Co.; Standard Oil Co. v. Same (Idaho), 39 Pac. 550.

SUFFICIENCY OF AFFIDAVIT: An affidavit, showing by recital only, that affiant is the agent of plaintiff, wherein the facts are stated positively is sufficient without direct averment of agency or that the facts are particularly within affiant's knowledge, or alleging any reason why affidavit was not made by plaintiff. An affidavit averring indebtedness upon a contract for the direct payment of money is not fatally defective for not averring whether the contract was express or implied.—Simpson v. McCarty, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37.

SAME, SUFFICIENCY OF AFFIDAVIT: Affidavit is sufficient which alleges that plaintiff has no security by mortgage or lien upon real or personal property, although it omits the other statutory clause, "or pledge of personal property."—Glidden v. Whittier, 46 Fed. Rep. 437.

Section 3296. Undertaking. Notice. Creditor's Share

Pro Rata: Before issuing the writ the clerk must require a written undertaking on the part of the plaintiff in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recover judgment, or, if the attachment be wrongfully issued, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment not exceeding the sum specified in the undertaking; and two days after issuing such writ and delivering it to the proper officer the clerk must post at the front door of the court house and cause to be published in some newspaper published in the county, if there be one, a notice, setting out the title of the cause and the fact that an attachment has been issued against the property of the defendant. Such notice shall be kept posted at least ten days and shall be published, if a weekly paper, in three issues thereof, and if any other than a weekly paper, in at least six issues. Any creditor of the defendant, who, within sixty days after the first posting and publication of such notice, shall commence and prosecute to final judgment his action for his claim against the defendant shall share pro rata with the attaching creditor in the proceeds of defendant's property where there is not sufficient to pay all the judgments in full against him.

1887 R. S. Sec. 4304, amended 1899, 5th Ses. p. 250; 1895, 3d Ses. p. 75.

Undertaking exceeding \$2000 sureties may justify for less than the whole amount: Sec. 3749.

State, county and officers are not required to give: Sec. 3750.

Statutory form applicable to all undertakings: Sec. 3752.

Sureties, justification of: Sec. 3261.

Dismissal of action on. Clerk to hand undertaking to defendant: Ses. 3499, Sub. 1.

UNIMPORTANT CLERICAL ERRORS DISREGARDED: The purpose of the undertaking in attachment provided for in the statute is to indemnify the defendant, and, where it is conclusive that this end has been served, mere clerical errors or the omission or inser-

tion of unimportant words will not vitiate the instrument. — *Simmons Hardware Co. v. Alturas Commercial Co.*; *Standard Oil Co. v. Same* (Idaho), 39 Pac. 550.

UNDERTAKING, AMOUNT REQUIRED: The attachment laws of this state vests a large discretion in the clerk of the district court in the matter of taking undertakings, and in the exercise of that discretion it is advisable that the clerk should always require an undertaking at least equal to the amount stated in the affidavit. — *Willman v. Friedman* (Idaho), 35 Pac. 37.

ACTION ON BOND: If issued upon such false or defective affidavit, the obligors on the bond given to procure

the release of the attachment, may under proper pleadings, prove such fact in defense of a suit on the bond.

AFFIDAVIT AS EVIDENCE: In such suit the affidavit in the original cause may be introduced in evidence for the purpose of showing that it was defective or false. — *Murphy v. Montandon*, 2 Idaho, 1048, 29 Pac. 851.

ACTION AGAINST SURETIES. SUFFICIENCY OF ANSWER: Where, in an action against the sureties on an undertaking in attachment, the answer alleges that the action in which the undertaking was given was prematurely brought, a motion to strike out such answer as not constituting a defense was properly granted. — *Guthrie v. Fisher*, 2 Idaho, 101, 6 Pac. 111.

Section 3297. Writ, to Whom Directed and What to State: The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant, within his county, not exempt from execution or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached; in which case, to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties; and the plaintiff may have other writs of attachment as often as he may require at any time before judgment.

1887 R. S. Sec. 4305.

Seal necessary to writ: Sec. 3026, Sub. 1.

When suit may be commenced on undertaking: Sec. 3309.

ATTACHMENT, SECOND LEVY, EFFECT ON FIRST: The issuance and levy of the second charge of attachment on the same property is not an abandonment of the first levy under the peculiar circumstances of this case. — *Wright v. Westheimer*, 2 Idaho, 962, 28 Pac. 430.

DUTY OF CLERK IN ISSUING WRITS: While the clerk of the district court is bound to issue writs of attachment in the order in which they are demanded, yet if the party who makes the first demand is not in attendance to receive his writ when completed, the clerk is not bound in the meantime to delay the issuing of other writs against the same party. When the clerk has prepared for delivery the writ first demanded, he is bound to issue the writ of the next comer; and if in such case the first comer is not there to receive his writ, and for that reason the next comer first delivers his writ to

the sheriff, and by that means acquires a priority, and the first comer loses his debt, the clerk is not liable. — *Lick v. Madden*, 36 Cal. 208, 95 Am. Dec. 175.

An attachment regular upon its face can not be treated as void by the sheriff because the complaint does not set up a cause of action which would warrant the issuance of the attachment. — *McComb v. Reed*, 28 Cal. 282, 87 Am. Dec. 115.

WRIT MUST CONFORM TO COMPLAINT: Where the complaint demands different amounts from the several stockholders of a corporation, who are jointly sued as co-defendants with the corporation, a writ of attachment issued thereon must conform to the complaint and direct the attachment of so much property of the respective defendants as will secure the amount alleged to be due from each. If the writ is issued against the property of any defendant for an amount exceeding the demand made against him in the complaint, the writ must be discharged as to such defendant, on his motion, even though no more of his property is

attached than is sufficient to satisfy the demand against him.—Kennedy v. The California Savings Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163.

Section 3298. Shares of Stock and Debts Due Defendant, How Attached: The rights or shares which the defendant may have in the stock of any corporation or company, together with the interests and profit thereon and all debts due such defendant, and all other property in this State of such defendant not exempt from execution may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

1887 R. S. Sec. 4306.

Not against materials furnished for building, etc., so as to defeat security of lien: Sec. 3346.

IRRIGATION CORPORATION, SHARES NOT APPURTENANT TO LAND: Shares of stock owned by the execution defendant in an irrigation corporation are not appurtenant to the lands owned by such execution defendant, although he irrigates such lands with water from a canal owned by such corporation.—Wells v. Price (Idaho), 56 Pac. 266.

ATTACHMENT, MONEY IN CUSTODY OF THE LAW NOT SUBJECT TO: Money in hands of sheriff, collected under execution, is not subject to attachment or garnishment, as a debt due to the plaintiff in execution, but is in the custody of the law until finally and properly disposed of. Where the attaching creditor is without other relief, suggested but not decided that chancery would afford relief. The sheriff can not attach money collected on execution in his own hands; if subject to process, such process must be served by the coroner.—Clymer v. Willis, 3 Cal. 363, 58 Am. Dec. 414.

Funds in the hands of an assignee in insolvency can not be attached, even though the proceedings are illegal and void; in such case the assignee becomes merely the custodian or receiver of the

funds in his hands by virtue of the order of the court, and holds it subject to the direction of the court.—Adams v. Haskell, 6 Cal. 113, 65 Am. Dec. 491.

Right to attach property in the hands of an assignee for creditors: See note 26 L. R. A. 593-600.

PROPERTY IN CUSTODY OF FOREIGN RECEIVER: Property in this state can not be secured from attachment at the suit of the creditor of the owner by being placed in the possession of a bailee; and the sole question between the bailee and the attaching creditor is one of superiority of right. Property of a railway company in the lawful custody of a foreign receiver, if brought into the state by him in the course of business, is subject to attachment under its laws by a creditor of the company, resident in this state, and the rights of the receiver must depend upon the comity of the state.—Humphreys v. Hopkins, 81 Cal. 551, 22 Pac. 892, 15 Am. St. Rep. 76; see also dissenting opinion, and note 15 Am. St. Rep. pages 81 and 82.

Where a partnership is composed of two or more firms, the creditors of one of the firms are entitled to preference in the payment of their debts, over the creditors of the whole partnership, out of money the proceeds of the property of that firm.—Bullock v. Hubbard, 23 Cal. 495, 83 Am. Dec. 130.

Section 3299. How Real and Personal Property Shall be Attached: The sheriff to whom the writ is directed and delivered, must execute the same without delay, and if the undertaking mentioned in Section 3297 be not given, as follows:

1. Real property, standing upon the records of the county in the name of the defendant, must be attached, by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached; and by leaving a similar copy of the writ, description and notice with an occupant of the property, if there is one, if not, then by posting the same in a conspicuous place on the property attached;

2. Real property or an interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached, by

filing with the recorder of the county a copy of the writ together with a description of the property, and a notice that such real property, and any interest of the defendant therein, held by or standing in the name of such other person (naming him), are attached; and by leaving with the occupant, if any, and with such other person, or his agent, if known and within the county, or at a residence of either, if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property. The recorder must index such attachment when filed, in the names, both of the defendant and of the person by whom the property is held, or in whose name it stands on the records;

3. Personal property, capable of manual delivery must be attached by taking it into custody;

4. Stock or shares, or interest in stock or shares, of any corporation or company, must be attached by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ;

5. Debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits or other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him, to the defendant, or the credits or other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ.

1887 R. S. Sec. 4307.

ATTACHMENT, LEVY, SERVICE:

Under the provisions of Sub. 2 of this section, the levy of a writ of attachment must be in substantial compliance with the provisions of said section in order to create a lien. Where the statute requires copies of the writ, description of the property, and notice of levy to be served on the occupant, if there be one, and if there be none, the posting of such copies in a conspicuous place on the land levied upon it is not a sufficient compliance with said provisions to serve such copies on the owner, who is not an occupant of the land.—*Williams v. Olden* (Idaho), 61 Pac. 517.

SHERIFF, SERVICE OF PROCESS:

It is well settled that a sheriff can not refuse to serve process regularly issued to him because in his opinion it is defective or irregular.—*Roth v. Duvall*, 1 Idaho, 149.

EXEMPT PROPERTY, JUDICIAL DISCRETION: The question as to whether property is exempt from execution involves the exercise of judicial discretion, and its decision is not con-

fided to the action of the attaching officer.—*Roth v. Duvall*, 1 Idaho, 149.

SHERIFF, INDEMNIFICATION:

When the sheriff has doubts as to the legality of a levy in the first instance, he may refuse to execute the writ unless indemnified; but if he does attach and returns his writ, he places all question as to its validity before the court.—*Roth v. Duvall*, 1 Idaho, 149.

COMPLIANCE WITH STATUTE,

LIEN: The provisions of the statute in regard to the levy of a writ of attachment must be substantially complied with in order to create a lien under the attachment.—*First Nat. Bank of Hailey v. Sonnelitner* (Idaho), 51 Pac. 993.

SAME, DESCRIPTION OF PROP-

ERTY: The notice of levy of attachment, required by the statute to be filed in the county recorder's office, must describe the property sufficiently to identify the property so that a purchaser can tell from the notice itself what property he is buying.—*First Nat. Bank of Hailey v. Sonnelitner* (Idaho), 51 Pac. 993.

LEVY AND NOTICE HELD SUFFICIENT: The evidence of the levy of the attachment and the notice thereof, filed with the recorder, held sufficient to give notice of the attachment lien.—*First Nat. Bank v. Lieuallen et al.* (Idaho), 39 Pac. 1108.

SHERIFF'S DEED, TITLE INITIATED BY ATTACHMENT: A sheriff's deed for land sold under execution relates back to the date of the attachment, and cuts off all subsequent liens.—*First Nat. Bank v. Lieuallen et al.* (Idaho), 39 Pac. 1108.

HOMESTEAD, EXEMPTION FROM JUDGMENT, LEVY BEFORE FILING DECLARATION: Wright sold and conveyed his homestead and, with a part of the proceeds of such sale, purchased another residence, intending it for a homestead. W. & Sons levied an attachment upon the residence so purchased before Wright filed his homestead declaration thereon. Held, that the purchase of a new homestead with the proceeds of the sale of an old homestead does not exempt such new homestead from attachment of execution levied prior to the filing of the homestead declaration for record as required by Section 3071 of the Rev. St. of Idaho.

Note: Under amendment proceeds of sale of exempt homesteads can not be levied upon.—*Wright v. Westheimer*, 2 Idaho, 962, 28 Pac. 430.

PERSONAL PROPERTY, RETAINING POSSESSION, SUBSEQUENT LIENS: Under the levy of a writ of attachment on personal property, if the custody and possession thereof is such as to enable the officer to hold the property and subject it to the order of the court issuing the writ, it is sufficient to create a lien thereon prior to a lien of a chattel mortgage executed and filed subsequent to making the levy of the writ, but prior to taking actual possession of all of the property on which said writ was levied, provided the officer proceeds with reasonable diligence to reduce all of such property to his actual possession, and does so reduce it.—*Falk-Block Mercantile Co. v. Branstetter* (Idaho), 43 Pac. 571.

COSTS, EXPENSES OF SHERIFF, REMOVING ATTACHED PROPERTY: Where the statute provides that the sheriff shall be allowed for his trouble and expenses in taking and keeping possession of and preserving property under attachment, etc., such sum as the court may order, provided no more than \$3.00 per day be allowed the keeper. Where an expense of \$688.20 was incurred by the sheriff without the order of the court for the removal of lumber from the mill of defendants, no necessity for the removal appearing, held, that such charge

should be disallowed.—*McConnell v. McCormick*, 2 Idaho, 957, 28 Pac. 421.

KEEPER'S FEES, SHERIFF'S LIABILITY, ESTOPPEL: Where a deputy sheriff employs one as a keeper of attached property, and the sheriff acquiesces for a period of fourteen months, he cannot thereafter repudiate such employment.—*Chenowith v. Cameron* (Idaho), 42 Pac. 503.

ATTACKING VALIDITY OF CHATTEL MORTGAGE: A creditor has the right to attack the validity of a chattel mortgage by attaching property described therein, giving indemnifying bond to sheriff, and selling the property.—*McConnell v. Langdon*, 2 Idaho, 892, 28 Pac. 403.

SAME, LIABILITY OF CREDITOR AND SHERIFF: The sheriff and creditor do this, however, at the peril of being obliged to pay all damages to the mortgage if the mortgage is held good.—Id.

CHATTEL MORTGAGE, DISCHARGE OF LIEN: When a creditor seeks to subject the property of his debtor to the payment of his claim, upon which property there exists a chattel mortgage, and the creditor, to avail himself of the remedy provided by Section 3389, Rev. St., pays to the mortgagee the amount of such mortgage, such payment by the creditor discharges the mortgage and the lien thereunder, and the creditor can not thereafter enforce the mortgage lien.—*Baumgartner v. Vollmer* (Idaho), 49 Pac. 729.

ATTACHMENT, EFFECT OF LEVY, HOW MADE: A writ of attachment is effectual to change the title of personal property, only from the time of levy. A levy may be good as against the defendant in the writ, and not good as to third persons. The conduct of the defendant may make the levy good, by way of waiver, or estoppel, or agreement. As to third persons, there can be no levy when the officer does not know the subject of the levy—as where he stands at the door of a store, which is locked, and keeps others out. The levy dates from the time he gets into the store and takes possession.—*Taffts v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610.

In the service of process the sheriff is responsible only for unreasonably, or not reasonably, executing it. He is not bound to start on the instant of receiving a writ to execute it, without regard to anything else. The sheriff is responsible for the acts of his deputy.—*Whitney v. Butterfield*, 13 Cal. 335, 73 Am. Dec. 584.

The lien of an attaching creditor of real estate takes effect immediately

upon the levy of the attachment, and the deposit of a copy of the writ, together with a description of the land attached, with the county recorder.—*Ritter v. Scannell*, 11 Cal. 239, 70 Am. Dec. 775.

Sheriff having attachment may levy on defendant's interest in a growing crop of grain under a contract to work land on shares; and to do this, may take and detain possession of the entire quantity of grain; but he can sell under the execution on a judgment that may be recovered only the undivided interest of such defendant, the purchaser at the sale becoming a tenant in common with the owners of the other undivided interests.—*Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147.

Where parties are tenants in common of hay, sheriff may take the whole into his possession under a writ of attachment against one, though he can sell only the interest of the one against whom the writ issued; but replevin will not lie against the officer by the other tenant to recover the hay before it is sold under the writ.—*Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 549.

The lien of firm creditors, is paramount to the lien of individual creditors. And, where one partner buys out his co-partners, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts, just

as before the sale. The lien of firm creditors attaching, must be preferred to the lien of an individual creditor of the remaining partner, attaching first. The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors, who have not yet obtained judgment.—*Conroy v. O'Connor*, 13 Cal. 626, 73 Am. Dec. 605.

Attachment of individual property of one partner for fraud of his co-partner, see note 25 L. R. A. 645.

Goods stored in a warehouse are sufficiently levied upon under a writ of attachment, by taking actual possession of and placing them in charge of a keeper.—*Sinsheimer v. Whitley*, 111 Cal. 378, 43 Pac. 1109, 52 Am. St. Rep. 192.

"Debts" and "credits" are separate and distinct things, within the meaning of the Code of Civil Procedure relating to attachments. A "debt" is money owing by the garnishee to the defendant which may be paid over to the sheriff, while credits are something belonging to the defendant, but in the possession and under the control of the garnishee, such as promissory notes or other evidences of indebtedness of third parties, which may be delivered up or transferred to the sheriff.—*Gow v. Marshall*, 90 Cal. 565, 27 Pac. 422.

GARNISHMENT.

Section 3300. Attorney May Give Written Instructions What to Attach: Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ.

1887 R. S. Sec. 4308.

As to the situs of debts for the purposes of garnishment: See exhaustive note 69 Am. St. Rep. 113-127.

WHAT DEBTS MAY BE GARNISHEED: Indebtedness of maker upon promissory note before its maturity is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. Nor can such indebtedness, after the maturity of the note, be attached, unless the note is at the time in the possession of the defendant, from whom its delivery can be enforced on its payment upon the attachment.—*Gregory v. Higgins*, 10 Cal. 339, and the same rule applies to funds in the hands of a banker on

which certificate of deposit is issued.—*McMillan v. Richards*, 9 Cal. 365; see page 418, 70 Am. Dec. 655.

ORDER FOR MONEY: After the delivery and presentation of an order the debt due by the drawee could not be reached on attachment issued by the creditors of the drawer. As against any attempt by them to enforce its payment upon any such proceeding, the order would be an effectual protection, as it would also against the suit of the assignor to collect the amount, unless such suit is prosecuted for the benefit of the assignee.—*Wheatley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522. A garnishment is premature when it is based upon a writ against the vendor of chattels, and is served on the pur-

chaser before they have been delivered, and, therefore, before it is certain that any sale will be perfected, or any sum of money will ever become due to the vendor on account of the sale.—*Maier v. Freeman*, 112 Cal. 8, 44 Pac. 357, 53 Am. St. Rep. 151.

Judgment debtor may be garnisheed by delivering to him a copy of the writ of execution, with a notice in writing stating that all his right, title, and interest in such judgment, and all moneys, goods, credits, and effects due or owing by him to the judgment creditor are levied upon.—*Dore v. Dougherty*, 72 Cal. 232, 13 Pac. 621, 1 Am. St. Rep. 48; to the same effect see *Latham v. Blake*, 77 Cal. 646, 18 Pac. 150; 20 Pac. 417.

IN WHOSE HANDS MONEY, ETC., MAY BE GARNISHEED: After the decree of distribution money in the hands of the administrator, distributed to an heir or devisee, may be garnished by a creditor of the distributee, or may be reached by proceedings supplementary to execution.—In the matter of the Estate of Ellen Nerac, Deceased, 35 Cal. 392, 95 Am. Dec. III.

FUNDS HELD BY OFFICER OF THE COURT: When a defendant has a right to a certain distributive share of a fund in the hands of a receiver, master in chancery, or trustee of court, the officer may be effectually garnisheed by a creditor of the party so entitled, after the court has ordered it to be paid, and the officer has nothing more to do with the fund than to pay it over.—*Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 26 Pac. 518, 22 Am. St. Rep. 331. A county is liable to garnishment for a debt due by it to its officer, under a statute declaring that all persons are subject to garnishment, that the word

"person" may be applied to "bodies, politic and corporate," and that counties are such bodies.—*Waterbury v. Board of Commissioners of Deer Lodge County*, 10 Mont. 515, 26 Pac. 1002, 24 Am. St. Rep. 67, and note page 73 as to the general rule that municipalities are never liable to the process of garnishment. In Washington it is held that a county is not liable to garnishment unless made so by express statutory provisions.—*State of Washington v. Summerfield*, 14 Wash. 495, 45 Pac. 31, 37 L. R. A. 207 and note.

Where a debtor transfers to a creditor personal property to be sold by him, and the proceeds applied to the payment of his debt and the debts of certain other creditors, with their consent, the transferee and those he represents obtain a lien upon the property and its proceeds, superior to any which other creditors could acquire by the subsequent levy of an attachment or other process thereon.—*Handley v. Pfister*, 39 Cal. 283, 2 Am. Rep. 449.

LIEN OF GARNISHMENT: A notice of garnishment served upon a debtor gives the creditor a right of action against the garnishee for money or property in his hands, owing or belonging to the party against whom the writ runs; but it does not create a lien on all the garnishee's property which may subsequently be delivered in payment of the debt.—*Hulley v. Chedic*, 22 Nev. 127, 36 Pac. 783, 58 Am. St. Rep. 729.

Garnishment by plaintiff of a debt due the defendant creates an inchoate right to a lien upon the property of the garnishee. — *Montana National Bank v. Merchants' National Bank*, 19 Mont. 586, 49 Pac. 149, 61 Am. St. Rep. 532.

Section 3301. Garnishment, when Garnishee Liable to Plaintiff:

All persons having in their possession or under their control, any credits or other personal property belonging to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last two Sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged or any judgment recovered by him be satisfied.

1887 R. S. Sec. 4309.

Execution, similar proceedings under: Sec. 3563.

Garnishee may pay debt to sheriff after execution issued: Sec. 3564.

Cited in *Simpson v. Remington* (Idaho), 59 Pac. 360.

CONTINUANCE, DETERMINATION OF PROCEEDINGS IN GARNISHMENT: An attachment suit is

commenced by the First National Bank of Hailey against Bews, J. W. Hodgman, et al., and the writ of attachment is served upon George A. McLeod as garnishee. Thereafter Van Ness brings suit against McLeod on two promissory notes. McLeod files a motion, supported by affidavit, for a suspension of proceedings in the latter suit, until his liability in the attachment suit be de-

terminated, alleging that the notes upon which he is sued are the property of Hodgman, and were transferred to Van Ness to defeat and defraud his creditors. Held, that proceedings in the latter suit should be suspended until the liability of McLeod in the garnishment proceedings is determined.

FRAUDULENT CONVEYANCE, RIGHTS OF CREDITORS, REACHING PROPERTY BY GARNISHMENT: Held, also that property or debts transferred by defendant in attachment in fraud of creditors may be reached by the creditors by process of garnishment, although the defendant could not recover them himself.—*Van Ness v. McLeod*, 2 Idaho, 1147, 31 Pac. 798.

GARNISHMENT AND EQUITABLE TRANSFER, CONFLICT BETWEEN: An order given on a debtor for the payment to the person in whose favor the order is drawn of a debt then existing, or in potential existence, though not accepted, takes precedence over a subsequent garnishment of the same debt.

GARNISHMENT, OFFICER'S LIABILITY FOR MONEYS IMPROPERLY PAID TO HIM: If, upon the service of a garnishment, the person, garnisheed answers that he is indebted to the judgment debtor, and pays the amount of the debt to the officer, it having before such garnishment been assigned to another and the debtor notified of the assignment, the assignee can not maintain an action against the officer to whom such payment was made. He is justified in receiving payment, and applying it upon the writ, and the remedy of the assignee is against the original debtor, who remains liable notwithstanding the payment, because he can not, after notice of the assignment, relieve himself from

liability by payment to a person other than the assignee. A debtor having notice of the assignment of a debt made by his creditor can not, by paying moneys to an officer subsequently garnishing the debt, under a writ against the creditor, relieve himself from liability to such assignee.—*Merchant's, Etc. Nat. Bank v. Barnes*, 18 Mont. 335, 45 Pac. 218, 56 Am. St. Rep. 586, 47 L. R. A. 737.

PAYMENT BY A GARNISHEE: If a judgment creditor assigns the judgment, and the judgment debtor, without notice of the assignment, afterwards pays the same voluntarily to the sheriff by reason of the service of garnishee process upon him, the rights of the assignee are not affected, and he may still enforce the judgment.—*Brown v. Ayers*, 33 Cal. 525, 91 Am. Dec. 655. Garnishee knowing of defense is not protected in paying over money.—*Hardy v. Hunt*, 11 Cal. 343, 70 Am. Dec. 787.

GARNISHMENT AS DEFENSE TO ACTION: The fact that the defendant in an action for the recovery of money has been garnisheed by a creditor of the plaintiff constitutes no defense to the action, and can not be set up in the answer as a plea in bar. The remedy of defendant in such case is by motion, based upon affidavit of the fact, for stay of proceedings until the action against the plaintiff or the attachment therein is disposed of.—*McKeen v. McDermott*, 22 Cal. 667, 83 Am. Dec. 86.

Vendor of goods is liable to assignee of vendee if he sells the goods after notice of the assignment and pays the proceeds to the attaching creditors of the vendee. Notwithstanding the attachments were served on him before notice of the assignment.—*Morgan v. Lowe*, 5 Cal. 325, 63 Am. Dec. 132.

Section 3302. Citation to Garnishee to Appear Before Court: Any person owing debts to the defendant, or having in his possession or under his control, any credits or other personal property belonging to the defendant, may be required to attend before the court or judge or a referee appointed by the court or judge and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property and may be examined on oath. The court or judge may, after such examination, order personal property capable of manual delivery to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

1887 R. S. Sec. 4310.

Proceedings supplementary to execu-

tion: Secs. 3562-3569.

Proceedings to determine liability

where debt denied or adverse interest claimed by garnishee and to restrain transfer pending: Sec. 3568.

GARNISHMENT, JUDGMENT: When a debt claimed to be due by one person to another is attached as provided for by Section 3301, and such per-

son had been examined under this section, and the extent of the liability denied, the court or judge has no power to order the judgment against such alleged debtor upon such examination.—*Lindenthal v. Burke*, 2 Idaho, 535, 21 Pac. 419.

Section 3303. Inventory, Memorandum, Costs, when Refused: The sheriff must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to the debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each and if such memorandum be refused, he must return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the cost of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debt or credit.

1887 R. S. Sec. 4311.

SHERIFF'S LIABILITY: If a sheriff execute the writ on property, and does not affix such a value as will charge him with less than the plain-

tiff's claim, he is presumed to have satisfied himself that he had sufficient, and is chargeable on that basis.—*Roth v. Duvall*, 1 Idaho, 149.

DISPOSITION OF PROPERTY ATTACHED.

Section 3304. Perishable Property, How Sold; Accounts to be Collected: If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to issuing of the attachment. Debts and credits attached may be collected by him if the same can be done without suit. The sheriff's receipt is a sufficient discharge for the amount paid.

1887 R. S. Sec. 4312.

Sale before judgment: Sec. 3543.

ORDER OF COURT REQUIRED: A sheriff has no right to assume to sell attached property as perishable without an order of the court, which order

must be predicated upon a sworn statement by the sheriff showing the character of the property claimed to be perishable, and the amount thereof.—*Work v. Kinney* (Idaho), 51 Pac. 745.

Section 3305. Property Attached May be Sold, When: Whenever property has been taken by an officer under a writ of attachment and it is made to appear satisfactory to the court, or a judge thereof, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution,*and the proceeds to be deposited in the court to abide the judgment in the action. Such order can be made only upon notice to the adverse party or his attorney. in case such party has been personally served with a summons in the action.

1887 R. S. Sec. 4313.

Sale before judgment: Sec. 3543.

Section 3306. When Property Claimed by Third Party: If any personal property attached be claimed by a third person as his property, the sheriff may summon a jury of six men to try the validity of such claim; and such proceedings shall be had thereon, with the like effect as in case of a claim after levy upon execution.

1887 R. S. Sec. 4314.

Jury in such case: Sec. 3540.

Indemnifying bond: Sec. 3540.

INDEMNIFYING BONDS: In action against sheriff, if he gives notice to the sureties, the judgment against him is conclusive of his right to recover against sureties, and summary judgment may be entered thereon: Sec. 3748.

ATTACHMENT, INDEMNIFYING BOND, LIABILITY OF SUBSEQUENT ATTACHING CREDITOR: Where a sheriff levies on personal property under attachment, and, holding under such levy, receives a second attachment, and levies on the same property under the second attachment, and afterwards, but before sale on either, a third person claiming the property, the second attaching creditor indemnifies the sheriff against loss under the second attach-

ment, and the sheriff sells under execution in the first attachment suit, and pays all the proceeds to the first attaching creditor, the claimant of the property having recovered of the sheriff the value of the property sold, held (1) that the sheriff can not recover on the indemnifying bond of the second attaching creditor; (2) the complaint not claiming, nor the proof showing, that after the levy the sheriff did any act under the second attachment, the second attaching creditor is not liable, (Beatty, C. J. dissenting); (3) in such case, when the sheriff has rested, it is not error for the court to instruct the jury to find for the defendant; (4) in such case also, the effect of indemnifying bond must be determined by its own condition.—*Fury v. White*, 2 Idaho, 639, 23 Pac. 535.

Section 3307. If Plaintiff Obtains Judgment, How Satisfied: If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant, or a claimant as hereinbefore provided or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose;

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment;

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sale must be given, and the sales conducted as in other cases of sales on execution.

1887 R. S. Sec. 4315.

Proceedings upon preferred claims of employees of judgment debtor: Sec. 3375 et seq.

Upon attachment proceedings pending insolvency, costs are a claim against the estate: Sec. 4027.

Execution, sales on: Sec. 3544 et seq.

EXECUTION, ISSUANCE TO OFFICER LEVYING ATTACHMENT, VALIDITY: The officer who has seized goods under writ of attachment is the officer to whom the execution on the judgment should issue.

IMPROPER DIRECTION: The fact

that an execution on a judgment in attachment delivered to the constable who held the property by virtue of the levy made by him was directed to the sheriff of the county, does not render the execution void as such direction was an improper one and amendable.

CONSTABLE, ACTION FOR UNLAWFUL SEIZURE, EXECUTION AS EVIDENCE: In an action against such constable for the value of the goods held by him under such execution, the exclusion of the execution from evidence was reversible error.—*Pecotte v. Oliver*, 2 Idaho, 230, 10 Pac. 302.

JUDGMENT AGAINST NON-RESIDENT, BINDING ON ATTACHED PROPERTY: While a personal judgment against a non-resident debtor who is only served with process by publication is void, yet where the debtor has property within the state, which is seized under a writ of attachment issued in the action at the time of its commencement, a judgment therein, although general in its terms, has the effect of perpetuating the attachment lien, and of subjecting the attached property to its payment, and is so far in the nature of a proceeding in rem as to uphold a sale of the attached property, and for that purpose and to that extent is valid.—*Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

SUBSEQUENT ATTACHING CREDITORS, WHEN MAY INTERVENE:

In an action to recover money in which an attachment has been issued and levied upon property of the defendant, a subsequent attaching creditor may intervene at any time before the entry of judgment for the purpose of contesting the validity of the first attachment.—*Speyer v. Ihmels*, 21 Cal. 281, 81 Am. Dec. 157; *Kimball v. Richardson-Kimball Co.* 111 Cal. 386, 43 Pac. 1111.

DEATH OF DEFENDANT DESTROYS ATTACHMENT LIEN: If the defendant die after the levy of an attachment upon his property, and before judgment, his death destroys the attachment lien, and the attached property passes into the hands of the administrator, to be administered on in the due course of administration.—*Meyers v. Mott*, 29 Cal. 359, 89 Am. Dec. 49.

Section 3308. When there Remains a Balance Due, How Collected: If, after selling all the property attached by him remaining in his hands and applying the proceeds together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance, as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

1887 R. S. Sec. 4316.

Section 3309. When Suits May be Commenced on Undertaking: If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to Section 3297 or Section 3312, or he may proceed as in other cases upon the return of an execution.

1887 R. S. Sec. 4317.

RELEASE, DISSOLUTION, RETURN.

Section 3310. If Defendant Recover Judgment, Sheriff to Deliver Property: If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands must be delivered to the defendant or his agent. The order of attachment shall be discharged and the property released therefrom.

1887 R. S. Sec. 4318.

Attachments, effect of appeal on bond to continue: Sec. 3580.

The sheriff, upon judgment being rendered against the plaintiff, is bound to surrender the attached property to the

defendant, and is equally bound by the provisions of this section to deliver to the defendant the undertaking received in the action for the re-delivery of the attached property.—*Hamilton v. Bell*, 123 Cal. 93, 55 Pac. 758.

Section 3311. Proceedings to Release, Before Whom Taken: Whenever the defendant has appeared in the action, he

may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof for an order to discharge the attachment wholly or in part; and upon the execution of the undertaking mentioned in the next Section, an order may be made, releasing from the operation of the attachment any or all of the property attached, and all of the property so released, and all of the proceeds of the sales thereof must be delivered to the defendant, upon the justification of the sureties on the undertaking, if required by the plaintiff.

1887 R. S. Sec. 4319.

PROPERTY, APPLICATION FOR RELEASE: An application for the release of property held under attach-

ment or execution returned into court, should be made to the court or judge, and not to the attaching officer.—Roth v. Duvall, 1 Idaho, 149.

Section 3312. Release From Attachment, on What Terms: Before making such order, the court or judge must require an undertaking on behalf of the defendant by at least two sureties, residents, and freeholders, or householders, in the county, to the effect that in case the plaintiff recover judgment in the action, defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The court or judge making such order may fix the sum for which the undertaking must be executed, and, if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be required to justify before the court or judge, and the property attached cannot be released from the attachment without their justification if the same be required.

1887 R. S. Sec. 4320.

When suit may be commenced on undertaking: Sec. 3309.

Undertaking to prevent attachment: Sec. 3297.

Sureties, qualification of: Sec. 3749.

Justification: Sec. 3261.

Section 3313. Motion for Discharge, When and Before Whom Made: The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

1887 R. S. Sec. 4321.

Application refused, no subsequent application can be made to judge of another district: Sec. 3037.

Attachments, effect of appeal on bond to continue: Sec. 3580.

Attachment, appeal to supreme court from order dissolving, within what time: Sec. 3573.

STATUTORY GROUNDS EXCLUSIVE: Under the laws of Idaho, the only grounds upon which an attachment can be dissolved are that it was

improperly or irregularly issued.—Mason v. Lieuallen (Idaho), 39 Pac. 117.

ATTACHMENT, MOTION TO DIS-SOLVE: Motion to discharge, under statute of Idaho, may be for the irregularity of its issue, even after the attached property has been redelivered to the defendant after his giving the counter-undertaking provided for by statute.—Glidden v. Whittier, 46 Fed. Rep. 437.

JUNIOR ATTACHING CREDITOR: A junior attaching creditor can not take

advantage of irregularities in the affidavit or bond given by a prior attaching creditor of a common debtor.—*Friedenberg v. Pierson*, 18 Cal. 152, 79 Am. Dec. 162. Can question only on ground of fraud.—*Shea v. Johnson*, 101 Cal. 455, 35 Pac. 1023. As to the right of creditors to question the validity of an attachment, see extended note 35 L. R. A. 765-783.

DISCHARGE OF WRIT AS TO PAR-

Section 3314. Motion Made on Affidavit May be Opposed by Affidavit: If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

1887 R. S. Sec. 4322.

Section 3315. When Writ Must be Discharged: If upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged.

1887 R. S. Sec. 4323.

DISSOLUTION: A writ of attachment improperly issued should be dissolved on motion.—*Flannagan v. Newberg*, 1 Idaho, 78.

DISSOLUTION, DAMAGES, CROSS-COMPLAINT: Plaintiff swore out a writ of attachment at time of filing his complaint, which writ was on motion of defendant, dissolved as having been

TICULAR PROPERTY: An order discharging a writ of attachment in respect to particular property claimed not to be liable to seizure under the writ is, in effect, an order dissolving the attachment as to such property. It is an appealable order.—*Risdon Iron & Locomotive Works v. Citizens' Traction Co. of San Diego*, 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25.

wrongfully issued. Defendant then answered original complaint, and at same time filed cross-complaint, setting up claim for damages by reason of wrongful issuance of the writ of attachment. Held, that damages arising from the wrongful issuance of the attachment were proper matter for cross-complaint. *William v. Friedman* (Idaho), 38 Pac. 937.

Section 3316. Discharging Lien Upon Real Estate: Whenever in any action, real estate has been levied upon under writs, either of attachment or execution, and the lien of the writ has in any manner been lost or destroyed, the court out of which the writ issued or the judge thereof, may on application by any person interested make an order discharging said lien and the order or a certified copy thereof may be filed in the office of the county recorder in which the notice of the levy has been filed, and indexed in like manner as said notice.

1899, 5th Ses. p. 233; 1895, 3d Ses. p. 14.

Section 3317. When Writ to be Returned: The sheriff must return the writ of attachment with the summons, if issued at the same time; otherwise within twenty days after its receipt with a certificate of his proceedings indorsed thereon or attached thereto; and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be filed in the office of the county recorder in which the notice of attachment has been filed, and be indexed in like manner.

1887 R. S. Sec. 4324.

Return of inventory with writ: Sec. 3303.

SHERIFF, PRESUMPTION: Every intendment of law is in favor of the regularity of the proceedings of a sheriff under an attachment or execution, and nothing but willful disregard of the

rights of others will subject him to liability.—*Roth v. Duvall*, 1 Idaho, 149.

SHERIFFS AND CONSTABLES: An officer, to justify the seizure of chattels under a writ of attachment against a stranger to such writ, must show a valid writ, by showing the existence of all the jurisdictional facts that must

exist before the writ can issue; and he must do this by the record, or a duly authenticated copy thereof, of the attachment suit.—*Sears v. Lydon* (Idaho), 49 Pac. 122.

SHERIFF'S LEVY, ATTACK BY CREDITORS: An attaching creditor desiring to contest the validity of a sale must prove the debt or judgment, if it has been reduced to judgment, before he can be permitted to question the validity of the contest of the property as a pledge.—*Murphy v. Braase* (Idaho), 32 Pac. 208.

ATTACHMENT, REAL ESTATE, RETURN: Our statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a valid levy shall be set out

in the return; nor can such a rule be sustained.—*Ritter v. Scannell*, 11 Cal. 238, 70 Am. Dec. 775; but see contra *Brusie v. Gates*, 80 Cal. 467, 22 Pac. 284, and cases there cited.

AMENDMENT OF RETURN: The return of an attachment can not be amended so as to postpone the rights of creditors attaching subsequently, but before the collection.—*Webster v. Hawthorn*, 8 Cal. 21, 68 Am. Dec. 287.

RETURN, CONCLUSIVENESS OF: The return upon the writ of attachment is not conclusive of the validity of the attachment in a subsequent action against the successor of the corporation defendant.—*Blanc v. The Paymaster Mining Co.* 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149.

CHAPTER CXXXV.

RECEIVERS.

Section.

- 3318 Appointment of receiver.
- 3319 Appointment of receivers upon dissolution of corporation.
- 3320 Interested person ineligible; undertaking on ex parte application.

Section.

- 3321. Oath and undertaking.
- 3322. Power of receivers.
- 3323. Investment of funds.

Section 3318. Appointment of Receiver: A receiver may be appointed by the court in which an action is pending or has passed to judgment, or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or jointly interested in any property or fund, or the application of the plaintiff or of any party whose right to, or interest in the property, or fund, or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured.

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

3. After judgment to carry the judgment into effect;

4. After judgment to dispose of the property according to the judgment or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

5. In the case when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

1887 R. S. Sec. 4329.

Application refused, no subsequent application to judge of another district: Sec. 3038.

Receiver appointed in insolvency proceedings: Sec. 3947.

RECEIVER'S APPOINTMENT: A receiver can not be appointed prior to the commencement of an action.

WHEN COMMENCED: An action is not commenced until a complaint is placed in the hands of the clerk, or deposited in his office with directions to file the same.

SAME, PENDENCY: An action is not pending until it is commenced.—Gold Hunter Mining Co. v. Holleman, 2 Idaho, 839, 27 Pac. 413.

NOTICE TO DEFENDANT AFTER APPEARANCE: An order, made by the judge appointing a receiver in an action, after the defendant has appeared in such action, if made without notice to the defendant, is without jurisdiction and void.—Cummings et al. v. Steele, Judge (Idaho), 59 Pac. 15.

Appearance: See Sec. 3714.

EQUITIES DENIED BY ANSWER: It is error to appoint a receiver in any of the class of cases mentioned in Section 4329, Rev. St. Idaho, where the equities of the complaint are fully denied by the answer, and the evidence introduced by plaintiff on the hearing of the application for the appointment of such receiver is fully met and overcome by counter evidence by the defendant.—Sweeny v. Mayhew (Idaho), 56 Pac. 85.

DEPRECIATION OR WRONGFUL DISPOSAL OF PROPERTY: Where a party has property in his possession and under his control which he allows to depreciate in value, or wrongfully disposes of, in which another party has an interest, it is proper for the court to appoint a receiver.—Jones v. Quayle (Idaho), 32 Pac. 1134.

CREDITOR'S BILL, EQUITY JURISDICTION, FRAUDULENT CONVEYANCE BY DEBTOR: A judgment creditor is without a legal remedy when the title of defendant's property is clouded by a fraudulent assignment thereon and by another judgment which, though fraudulent, is held a prior lien, and when such property is in the hands of a receiver to be sold for the benefit of such fraudulent judgment.—Martin v. Atchison, 2 Idaho, 590, 33 Pac. 47.

CORPORATIONS: A court, in which an action is pending or has passed to judgment, in a case where a corporation has been dissolved or is insolvent, or in immediate danger of insolvency,

may appoint a receiver.—Security Savings & Trust Co. v. Piper, Judge (Idaho), 40 Pac. 144.

CERTIORARI, WHEN LIES, RECEIVER, APPOINTMENT: Certiorari will lie to review an order appointing a receiver, so as to determine, from the case as presented in the lower court, whether jurisdiction existed in such court, in the particular case made, to appoint a receiver.

It is error to appoint a receiver in any of the class of cases mentioned in Section 4329 Rev. St. Idaho, where the equities of the complaint are fully denied by the answer, and the evidence introduced by the plaintiff on the hearing of the application for the appointment of such receiver is fully met and overcome by counter evidence introduced by the defendant.

Plaintiff applied for appointment of receiver. Defendants filed their sworn answer, denying every equity and material allegation set forth in the complaint. On the hearing of the application, the pleadings, the affidavits of plaintiff and one witness in his behalf, and the affidavits of three witnesses on behalf of the defendants, were considered by the district judge. It was not alleged or proven that the defendants were insolvent, or unable to respond to the plaintiff in damages. Held, that under such showing the order made by the district judge was without authority, and should be annulled on certiorari.—Sweeney v. Mayhew (Idaho), 56 Pac. 85.

ORDER DENYING MOTION TO DISCHARGE RECEIVER NOT APPEALABLE: An order denying motion to discharge a receiver, overruling a demurrer, or adopting the report of a referee, is not appealable under our statute.—Jones v. Quayle (Idaho), 32 Pac. 1134.

RECEIVERS IN FORECLOSURE: In a foreclosure suit the plaintiff has no right to a receiver of rents and profits of the mortgaged property appointed pending the litigation.—Guy v. Ide, 6 Cal. 99, 65 Am. Dec. 490. Under the express provisions of the present statute it was held that a receiver may be appointed.—In Societe Francaise v. Selheimer, 57 Cal. 623. But the receiver acquires no title to crops growing on mortgaged land and the rents and profits before sale do not belong to the mortgagee.—Bank of Woodland v. Heron, 120 Cal. 618, 52 Pac. 1006; see also Simpson v. Ferguson, 112 Cal. 180, 44 Pac. 484, 53 Am. St. Rep. 201. In action for foreclosure of mortgage by

one mining partner upon interest in mine, rights of receiver.—*G. V. B. Mining Co. v. First National Bank*, 95 Fed. Rep. 35.

RECEIVER, PARTITION OF GROWING CROPS: Where a tenant in common of a growing crop is in the sole possession thereof, and denies the right of his co-tenant to any part thereof, and threatens to sell the entire crop and appropriate the proceeds to his own use, the co-tenant may maintain an action for the partition of the crop. In such action a receiver pendente lite may be appointed.—*Baughman v. Reed*, 75 Cal. 319, 17 Pac. 222, 7 Am. St. Rep. 170.

RECEIVER, SECURITY FOR MAINTENANCE: The court has jurisdiction to appoint a receiver at the commencement of the action, under the general provisions of this section for such appointment, "where receivers have been heretofore appointed by the usages of courts of equity," it being in accordance with such usage to enforce the wife's equitable demand for maintenance, which may be charged specifically upon property described in the complaint, by appointing a receiver, where it is necessary to preserve her equitable claim thereupon from loss.—*Murray v. Murray*, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97.

ACTION FOR DIVORCE: A receiver may be appointed to enforce the decree for maintenance, where the pleadings admit that the husband has endeavored and is endeavoring to sell, or encumber his property in this state, and that he is a resident of another state, to which he is attached by large holdings of property therein, and can not give personal attention to his properties in this state.—*Anderson v. Anderson*, 124 Cal. 48, 56 Pac. 630, and 57 Pac. 81, 71 Am. St. Rep. 17.

IN ACTIONS AGAINST CORPORATIONS: In a suit by a stockholder against a corporation and its officers

praying for their removal and for an account and settlement of the affairs of the corporation, it is error for the court to appoint a receiver and decree a sale of the property and a settlement of the affairs of the corporation. Such decree necessarily results in a dissolution of the corporation; thus doing indirectly what the court has no power to do directly.—*Neall v. Hill*, 16 Cal. 146, 76 Am. Dec. 508.

EQUITY JURISDICTION: The general and ordinary jurisdiction of courts of equity does not embrace the power to appoint a receiver of the property of a corporation in aid of a suit prosecuted against the corporation by a private person, but such power, if it exist at all, must be derived from a statute conferring it upon the court. This section does not confer it.—*La Societe Francaise v. District Court*, 53 Cal. 495; to the same effect see *Fischer v. Superior Court*, 110 Cal. 129. A receiver of a corporation pendente lite may be appointed by a court of equity when the complaint alleges that certain shareholders have obtained control and management of the stock of the corporation and elected their own officers; that they are taking all the profits of the corporation for their own use instead of paying them out in dividends; have kept false books to deceive stockholders; have pretended to buy a worthless franchise, and mortgage the property of the corporation in payment therefor, for the purpose of having such mortgage foreclosed and the property interests of the stockholders thereunder destroyed. The appointment of a receiver in such a case is justified, because it is not to dissolve the corporation, but to preserve its assets from being wasted and misappropriated in pursuance of a fraudulent conspiracy.—*State v. Second Judicial District*, 15 Mont. 324, 39 Pac. 316, 48 Am. St. Rep. 682.

Section 3319. Appointment of Receivers Upon Dissolution of Corporation: Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any member or stockholder thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over, among the stockholders and members.

1887 R. S. Sec. 4330.

DISSOLUTION, PRACTICE: In an

action by a stockholder for the dissolution of a corporation and a distribu-

tion of its assets, the court, having found the existence of the corporation as such, the amount of the capital stock, and the amount of the same held by each stockholder, proceeded to distribute a part of the assets in special among certain of the stockholders, without any finding as to the value of the same, and then decreed a sale of the balance of the property, and a distribution of the proceeds of the sale, upon the basis of a co-partnership. Held, error, not being in conformity with the provisions of Section 4330, Rev. St.—*Clow v. Redman* (Idaho), 57 Pac. 437.

CORPORATION RECEIVER: Where a corporation has passed into the hands of a receiver, it is error to join such corporation with the receiver in an action to recover money alleged to be due said receiver—*Idaho Gold Reduction Co. v. Croghan* (Idaho), 36 Pac. 164.

RECEIVER IN CASE OF FORFEITURE: The provision of the last preceding section, to the effect that a receiver may be appointed when a corporation has forfeited its character, does not mean that a receiver must be appointed, in such case, on the ground that the public has an interest that the power should be exercised; but the

true construction of that provision is to be found in this section of the Code which enumerates the creditors and stockholders as the only parties whose interest can demand the appointment of a receiver of such corporation.—*Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192.

RECEIVER, JUDGMENT FOR FINE: The fact that a fine was imposed upon a corporation in quo warranto proceedings, payable to the people of the state, does not authorize the state to commence a subsequent action to appoint a receiver of such corporation under this section, which only authorizes such action to be commenced upon the dissolution of the corporation, and the court will be restrained by writ of prohibition from further proceedings with respect to a receiver of the property of the corporation.—*Yore v. Superior Court*, 108 Cal. 431, 41 Pac. 477.

Sec. 565, Deering's Code of Civil Procedure, cited in the foregoing cases containing the same provision was enacted in 1880. For decisions concerning power of court to appoint receivers of corporations and equity jurisdiction generally prior thereto, see note to preceding section.

Section 3320. Interested Person Ineligible; Undertaking ex parte Application: No party, or attorney, or person interested in an action, can be appointed receiver therein, without the written consent of the parties, filed with the clerk. If a receiver be appointed upon an ex parte application, the court, before making the order, may require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking.

1887 R. S. Sec. 4331.

Qualifications of sureties: Sec. 3749.

Dismissal of action, on, clerk to hand

undertaking to defendant: Sec. 3499, Sub. 1.

Section 3321. Oath and Undertaking: Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking, to such person, and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

1887 R. S. Sec. 4332.

Proceedings by sureties to secure re-

lease and for the giving of new bonds and undertaking: Sec. 3753.

Provision for the protection of sureties by the deposit of funds in bank: Sec. 3754.

Provisions for reimbursement for premiums in guaranty surety companies: Sec. 3755.

Section 3322. Power of Receivers: The receiver has under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.

1887 R. S. Sec. 4333.

SUIT, PERMISSION OF COURT: Receiver can not be sued without first obtaining the permit of the court which appointed him.—*Martin v. Atchison*, 2 Idaho, 590, 33 Pac. 47.

RECEIVER OF CORPORATION, MISJOINDER: Where a corporation has passed into the hands of a receiver, it is error to join such corporation with the receiver in an action to recover money alleged to be due said receiver.—*Idaho Gold Reduction Co. v. Crogan* (Idaho), 56 Pac. 164.

TAXES, PROPERTY IN RECEIVER'S HANDS: Personal property in the hands of such receiver is not subject to seizure and sale for the collection of taxes thereon.—*Palmer v. Pettingill* (Idaho), 55 Pac. 623.

SAME, PAYMENT: When money or property in litigation is in the hands of a receiver of the court, and is assessed to such receiver, the taxes must be paid thereon by the receiver, under the direction of the court.—*Palmer v. Pettingill* (Idaho), 55 Pac. 623.

RECEIVER, COLLATERAL ATTACK ON APPOINTMENT OF: If it appears, upon the face of the proceedings, that a court's order appointing a receiver was without authority of law,

and therefore void, the order may be assailed collaterally, and with impunity, by anybody.—*State v. District Court*, 21 Mont. 155, 53 Pac. 272, 69 Am. St. Rep. 645.

GARNISHMENT, FUNDS HELD BY RECEIVER: When a defendant has a right to a certain distributive share of a fund in the hands of a receiver the officer may be effectually garnished by a creditor of the party so entitled, after the court has ordered it paid, and the officers has nothing more to do with the fund than to pay it over.—*Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 26 Pac. 518, 22 Am. St. Rep. 331.

RECEIVERSHIP, RIGHTS OF PARTNERSHIP CREDITORS: A bill for a dissolution of partnership and the appointment of a receiver, can not operate as an assignment for the benefit of creditors, so as to prevent a creditor from acquiring a legal priority, because all such assignments, except in insolvency, are void under the statute.—*Adams v. Woods*, 8 Cal. 152, 68 Am. Dec. 315.

As to the relation of receivers to pre-existing liens, and the remedies for their enforcement: See note 71 Am. St. Rep. 352-384.

Section 3323. Investment of Funds: Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made, except upon the consent of all the parties to the action.

1887 R. S. Sec. 4334.

CHAPTER CXXXVI.

DEPOSIT IN COURT.

Section.

3324. Deposit in court.

3325. Money paid to clerk, deposited with county treasurer.

Section.

3326. Manner of enforcing order.

Section 3324. Deposit in Court: When it is admitted by the pleading, or shown upon the examination of a party, that he has in his possession, or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by

him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

1887 R. S. Sec. 4339.

Order upon examination of garnishee: Sec. 3302.

Deposit of documents or personal property on appeal from order directing assignment: Sec. 3577

Deposit in lieu of undertaking, justice's court: Sec. 3697.

Deposit in lieu of undertaking, appeal to supreme court: Sec. 3582.

This section refers to property which is without question in the hands of a trustee as trust property, or which belongs to or is due to another; it does not refer to that where the party alleged to hold as trustee claims title to it in his own right.—Ex. parte Casey, 71 Cal. 269, 12 Pac. 118, Ried v. Steele, Judge, (Idaho), 64 Pac. 892.

Section 3325. Money Paid to Clerk Deposited with County Treasurer: If the money is deposited in court it must be paid to the clerk, who must deposit it with the county treasurer, by him to be held subject to the order of the court. For the safe keeping of the money deposited with him the treasurer is liable on his official bond.

1887 R. S. Sec. 4340.

Section 3326. Manner of Enforcing Order: Whenever, in the exercise of its authority, a court has ordered the deposit or delivery of money, or other thing, and the order is disobeyed, the court, beside punishing the disobedience, may make an order requiring the sheriff to take the money, or thing, and deposit, or deliver it in conformity with the direction of the court.

1887 R. S. Sec. 4341.

Contempt of court: Sec. 3819.

CHAPTER CXXXVII.

DIVORCES IN CASE OF INSANITY.

Section.

3327. Jurisdiction, procedure, notice to prosecuting attorney.

3328. Prosecuting attorney to appear and defend.

Section.

3329. Alimony, distribution of property, custody of children.

3330. Costs to be paid by plaintiff.

Section 3327. Jurisdiction. Procedure. Notice to Prosecuting Attorney: The district courts of the several judicial districts of this State shall have jurisdiction of actions for divorce under the provisions of Section 2028 of the Civil Code, and such action shall be brought in the county of this State in which the plaintiff resides. And the court in which such action is about to be commenced shall upon the filing by the plaintiff of a petition duly verified showing that a cause of action exists under this Chapter, appoint some person to act as guardian of such insane person in such action, and the summons and the complaint in such action shall be served upon the defendant by delivering a copy of such summons and complaint to such guardian and by delivering a copy thereof to the prosecuting attorney of the district in which such action is brought.

1899 5th Ses. p. 232.

A statute making chronic mania or dementia, existing for ten years or

more, one of the grounds upon which divorces may be granted is constitutional. The legislature may authorize

the granting of divorces by the courts for any causes deemed by it sufficient, though due to the misfortune of the defendant.—*Hickman v. Hickman*, 1 Washington, 257, 24 Pac. 445, 22 Am. St. Rep. 148. The marital relation is not regarded as resting upon contract, nor is the granting of a divorce or creating a cause therefor treated as in punishment for a crime; hence it is not restrained either by the prohibition against the enactment of laws impairing the obligation of contracts, or

against the passage of *ex post facto* laws. "The theory of these decisions is that in granting a divorce, or providing a cause for which the courts may grant it, the legislature does not necessarily punish a crime or a wrongful or immoral act, but merely, in the interests of society, provides the conditions in which it shall not be necessary for the spouses to continue in the marriage status or relation."—see note 37 Am. St. Rep. 593.

Section 3328. Prosecuting Attorney to Appear and Defend: It shall be the duty of the prosecuting attorney upon whom the summons and complaint in such action shall be served, to appear for such defendant in such action and defend the same, and no divorce shall be granted under the provisions of this Chapter except in the presence of the county attorney.

1899 5th Ses. p. 232.

Section 3329. Alimony, Distribution of Property, Custody of Children: In any action brought under the provisions of this Chapter the said courts and the judges thereof shall possess all the powers relative to the payment of alimony, the distribution of property and the care and custody of children of the parties that such courts now have, or may hereafter have in other actions for divorce.

1899 5th Ses. p. 233.

Section 3330 Costs to be Paid by Plaintiff: All the costs of the court in such action, as well as the actual expenses of the county attorney therein, together with the expenses and fees of the guardian therein, shall be paid by the plaintiff; such expenses of the county attorney and the expenses and fees of the guardian shall be fixed and allowed by the court, and the court, or the judge thereof, may make such order as to the payment of such fees and expenses as to the court, or judge, may seem proper.

1899, 5th Ses. p. 233.

CHAPTER CXXXVIII.

ACTIONS FOR THE FORECLOSURE OF MORTGAGES.

Section.

3331. Proceedings in foreclosure suits.

3332. Surplus money to be deposited in court.

Section.

3333. Proceedings when debt secured falls due at different times.

3334. A mortgage must not be deemed a conveyance.

Section 3331. Proceedings in Foreclosure Suits: There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this Chapter. In such action the court may, by its judgment, direct a sale of the incumbered property (or so much thereof as may be necessary) and the application of the proceeds of the sale to the pay-

ment of the costs of the court and the expenses of the sale, and the amount due to the plaintiff; and sales of real estate under judgment of foreclosure of mortgages and liens are subject to redemption as in the case of sales under execution; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.

1887 R. S. Sec. 4520.

In cases of assignment, insolvent debtor, mortgagee, may either waive security and present claim, or foreclose; or assignee may release equity of redemption for proper consideration: Sec. 3926.

Foreclosing mortgage against estate of decedent: Sec. 4143.

When mortgage claim allowed, payment to be made out of sale of real estate subjected to: Sec. 4203.

Holder may become purchaser and give receipt in lieu of money: Sec. 4204.

Statute of limitations, foreclosed within provisions of: Sec. 3130.

Action to redeem, mortgagee in possession: Secs. 3140-3141.

Complaint, copy attached, admitted unless answer denying verified: Sec. 3220.

Lis pendens: Sec. 3189.

Receiver appointed, when: Sec. 3318.

Injunction may be issued to restrain party in possession during foreclosure, after sale, from committing waste: Sec. 3385.

Place of trial: Sec. 3179.

If service be by publication, against non-resident, proof must be made by plaintiff or his agent of non-payment: Sec. 3501.

Order of sale, not writ of execution to enforce: Sec. 3534.

Death of defendant, after judgment; judgment, how enforced: Sec. 3536.

ABATEMENT, ANOTHER ACTION PENDING, FORECLOSURE OF CHATTEL MORTGAGES Under Code, Section 468, providing that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon personal property, a dismissal was proper of an action of claim and delivery, begun after the institution and during the

pendency of an action to foreclose a chattel mortgage upon the same property.—*Cederholm v. Loofborow*, 2 Idaho, 176, 9 Pac. 641.

RIGHTS OF SURETIES: Rev. St. Idaho, Section 4520 provides, "There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage. In such action the court may direct the sale of the encumbered property and the application of the proceeds to the debt, etc., and if a balance still remains, judgment can then be docketed for such balance against the defendant or defendants personally liable. Held, that where a mortgage was given by a maker to secure a note, and for the surety's safety, and the security is valuable, an action could not be maintained on the note alone against the maker and surety, ignoring the mortgage.—*First National Bank of Lewiston v. Williams*, 2 Idaho, 618, 23 Pac. 552.

MORTGAGE FORECLOSURE, LIMITATION: The state of limitation acts upon the remedy and not upon the debt, and the running of the statute does not extinguish the debt nor impair the lien of the mortgage given to secure the same, and where there is a promise in writing, signed by the party to be charged, to pay the interest due upon the whole of the pre-existing debt, this being an unequivocal acknowledgment of the whole debt, an action of foreclosure may be maintained within the statutory limitation after such acknowledgment.—*Kelly v. Leachman* (Idaho), 33 Pac. 44.

FORECLOSURE, PLEADING, NOTICE OF ELECTION TO SUE FOR WHOLE AMOUNT: In an action to foreclose a mortgage it is not necessary to allege in the complaint notice

to the mortgagor that the plaintiff has elected to consider the whole sum due for default in payment of installments of interest.—*Broadbent v. Brumback*, 2 Idaho, 336, 16 Pac. 555.

USURIOUS INTEREST, ACTION PREMATURELY BROUGHT: An action brought to foreclose a mortgage upon the ground that default had been made in the payment of coupon interest notes, which coupon interest notes are declared to be usurious and void, (see decision of this court in *Trust Co. v. Hoffman*, 49 Pac. 314), the principal note not being due at the time of the commencement of the suit, held, that the action is prematurely brought.—*Vermont Loan & Trust Co. v. Tetzlaff et al.* (Idaho), 53 Pac. 104; see also *Vermont Loan & Trust Co. v. Maxwell* (Idaho), 55 Pac. 1130.

REFORMATION, FORECLOSURE, JOINDER: A mortgage may be reformed and foreclosed in the same action.—*Christensen v. Hollingsworth* (Idaho), 53 Pac. 211.

SAME, COMPLAINT: A complaint containing all necessary averments for foreclosure of a mortgage, and for reformation of certificate of acknowledgment to such mortgage states but one cause of action.—*Vermont Loan & Trust Co. v. McGregor* (Idaho), 51 Pac. 102.

REFORMATION, COMPLAINT, ALLEGATION OF MISTAKE: Allegation in complaint that parties to a mortgage intended that certain land (describing it) should be described in and conveyed by such mortgage, and that the scrivener, in drawing the mortgage, omitted, through mistake, the number of the section in which such tract was situated; and prayer for reformation. Held, sufficient to grant reformation.

A mortgage may be reformed and foreclosed in the same action.

A clerical mistake in the description of land intended to be mortgaged by a married woman may be corrected upon a proper showing.—*Christensen v. Hollingsworth* (Idaho), 53 Pac. 211.

INSURANCE PREMIUMS VOLUNTARILY PAID: Insurance premiums voluntarily paid by the mortgagee, who insures the mortgaged property, can not be recovered by him in the absence of a provision in the mortgage authorizing him to insure the mortgaged property at the expense of the mortgagee.—*Miller v. Hunt* (Idaho), 57 Pac. 315.

STIPULATION FOR ATTORNEY'S FEES: A stipulation in a mortgage for an allowance for an attorney fee in case of foreclosure is valid, but should be enforced only for a reasonable amount. In determining what amount is reasonable, the court should allow

no more than is actually received or collected for his services.—*Broadbent v. Brumback*, 2 Idaho, 336, 16 Pac. 555.

DEFENSES TO MORTGAGE FORECLOSURE, CONSPIRACY TO DEFRAUD MORTGAGEE, ESTOPPEL: The claim of title asserted by one who knowingly enters into an arrangement for the purpose of defrauding a mortgagee of his vendor can not avail, as against the claim of such mortgagee.—*Brady v. Linehan* (Idaho), 51 Pac. 761.

PARTNER PURCHASING OUTSTANDING CLAIM: One member of a mining partnership uses the money of the partners to purchase an outstanding trust deed upon the mining property, given by his co-partner, taking the transfer in the name of a third person, who has no interest in the transaction, causes the property to be sold and bid in by said third party as his agent, and afterwards procures a transfer to be made of the property to himself and another partner. Held, that such transfer was void, and the property should be decreed to belong to the maker of the trust deed or his grantee.—*Brown v. Bryan* (Idaho), 51 Pac. 995.

PENDENCY OF ANOTHER SUIT. PRACTICE: A complaint not showing the pendency of another suit can be assailed only by answer.—*Stevens v. Home Savings and Loan Ass'n* (Idaho), 51 Pac. 779.

ANSWER, IMMATERIAL ALLEGATIONS: Where a mortgage is not in fact invalid, allegations in the answer that the principal has given subsequent mortgages on the land, to its full value, and that, unless the note be paid from the land, defendant will be damaged, as principal has no other property, are immaterial, and properly stricken out as the first mortgage has precedence.—*First National Bank of Lewiston v. Williams*, 2 Idaho, 618, 23 Pac. 552.

DEMURRER TO COUNTERCLAIM. MORTGAGE, FORECLOSURE: In an action by the mortgagee to foreclose his mortgage, the mortgagor may, in his answer, set forth a counterclaim for purchase money due him from the mortgagee on bargain and sale of realty; and it is reversible error to sustain a demurrer to such counterclaim on the ground that there is "no relation or connection between the subject-matter set out in the plaintiff's complaint and the said counterclaim."—*Miller v. Hunt* (Idaho), 57 Pac. 315.

ANSWER ASKING AFFIRMATIVE RELIEF, DISMISSAL, ERROR: Plaintiff commenced a suit to foreclose a mortgage, making the mortgagors and two others (the latter being subsequent purchasers of the mortgage) parties,

The last two parties were in default. The mortgagors answered, denying the execution and acknowledgment of the mortgage, and asking affirmative relief. The proofs being in, plaintiff moved to dismiss the action as to the mortgagors, waiving any claim for a deficiency judgment, which motion was granted by the court. Held, that the action of the court was error.—*Northwestern and Pacific Hypotheek Bank v. Rauch* (Idaho), 51 Pac. 764.

EVIDENCE, MORTGAGE FORECLOSURE: Where plaintiff offered in evidence a mortgage wherein the indebtedness claimed is acknowledged by the mortgagor, and no evidence was offered by the defendant to disprove the same, a verdict for the defendant was error.—*Montandon v. Wingert* (Idaho), 47 Pac. 814.

JUDGMENT, CERTAINTY REQUIRED: A judgment foreclosing a mortgage which does not determine with certainty the amount due upon the mortgage is void.—*Vermont Loan & Trust Co. v. McGregor* (Idaho), 51 Pac. 104.

JUDGMENT WHERE PARTY ENTITLED TO DEBT BUT NOT TO FORECLOSURE: If, in a suit to foreclose a mortgage, the court should decide that plaintiff is not entitled to a foreclosure, yet, nevertheless the plaintiff should have judgment for any portion of the mortgage debt shown by the pleadings and proof to be due him, against the defendants personally liable therefor.—*Jeckel v. Pease* (Idaho), 53 Pac. 399.

MONEY JUDGMENT NOT AUTHORIZED: There shall be no money judgment entered in an action to foreclose a mortgage lien, except as provided in Section 4520 Rev. St. the judgment in this case was a money judgment, and came under the provisions of Section 4810 Rev. St. in regard to undertakings on money judgments. Section 4, Rev. St. can hardly be invoked in this case. Section 3765, not applicable to this case. The Code has clearly and distinctly pointed out the procedure to be followed in cases, such as that under consideration in Sections 4809, 4817 Rev. St.—*Barnes v. Buffalo Pitts Co.* (Idaho), 57 Pac. 267.

CHATTEL MORTGAGE, ACTION FOR DEFICIENCY: The plaintiff held a chattel mortgage given by defendant to secure the payment of three promissory notes for purchase price of certain personal property. Default having been made by defendant in the conditions of mortgage, plaintiff foreclosed by notice and sale, as provided by statute. The return of the sheriff showed a deficiency of some \$900.00 to recover which amount plaintiff brings this ac-

tion. To a complaint setting forth all the details of the transaction, including the foreclosure, sale and return of the sheriff, showing deficiency in proper form, the defendant enters general demurrer, which is sustained by the court. Held, that the action was properly brought and that the action of the district court in sustaining the demurrer to the complaint was error.—*Advance Thresher Co. v. Whiteside*, 2 Idaho, 806, 26 Pac. 660.

FAILURE OF TITLE, REVIVAL OF JUDGMENT: W. having made entry and final proof on certain lands under the desert land laws of the United States, mortgaged same. Default having been made in payments secured by mortgage, the same was foreclosed, and at the sale the assignee of the mortgage became the purchaser. Prior to said sale, one R. had instituted proceedings in the proper land office to contest said desert entry of W. which contest eventuated in the cancellation of said entry of W. by the commissioner of the general land office. Held, that under Section 4498 of the Rev. St. of Idaho the plaintiff was entitled to file his petition to revive the judgment entered on the foreclosure of the mortgage.—*Cantwell v. McPherson*, 2 Idaho, 1044, 29 Pac. 102.

REDEMPTION, APPLICATION OF STATUTE: The amendments to Section 4492 Rev. St. made by the act of March 15th, 1895 (Laws 1895, p. 34), and re-enacted in 1899, in its present form, extended the time of redemption from judicial sales; and it was decided by the court that such amendment did not affect sales under foreclosure of mortgages when the mortgage was executed and recorded prior to the time the amendment became a law.—*Wilder v. Campbell, Sheriff* (Idaho), 43 Pac. 677.

APPEAL, BOND STAYING EXECUTION: On appeal from a judgment for foreclosure of a mortgage upon personal property, an undertaking in the sum of \$300 is sufficient to stay the execution of the judgment pending the appeal, and if the district court requires the appellant to give a further undertaking to stay execution, such undertaking is void, and can not be enforced against the sureties therein.—*Barnes v. Buffalo Pitts Co.* (Idaho), 57 Pac. 267.

MORTGAGE, PROPERTY SOLD SUBJECT TO INCUMBRANCES: A mortgagee may maintain his action in equity, but not at law, for recovery of the debt, against the grantee of the mortgaged property, who takes it subject to the incumbrances, or who agrees to pay them.

SAME, EFFECT UNDER IDAHO

STATUTES OF ACTION OF FORECLOSURE: When the mortgagee brings his action of foreclosure, he can not maintain another and separate action for personal judgment on the mortgage debt. (At law.)—*Winters v. Hub. Min. Co.* 57 Fed. Rep. 287.

MORTGAGE, FORECLOSURE, PENALTY FOR DEFAULT: There is no ground on which a court can refuse to enforce the payment of interest on the debt secured at the rate of 12 per cent after maturity, where such is the contract of the parties, and the note is not usurious.—*Vermont Loan & Trust Co. v. Dygert* (Idaho), 89 Fed. Rep. 123.

MORTGAGE, MISTAKE IN DESCRIPTION, RATIFICATION: Where, by mistake, a different description of land from that intended was written in a mortgage, but the mortgagors, who were the owners of both tracts, afterwards, with knowledge of the mistake, sold and conveyed the tract intended to be included, such act operated as a ratification upon their part of the mortgage as written.

ACKNOWLEDGMENT, SEPARATE EXAMINATION OF WIFE, SUFFICIENCY OF CERTIFICATE: Under a statute requiring the separate examination of a married woman by the officer taking the acknowledgment, and that the certificate shall be "substantially" in the form prescribed, a certificate which shows clearly that it was the desire and will of the wife to make the conveyance, and that it was done without the exercise of any undue influence of her husband upon her, is sufficient.—*Northwestern & P. Hypotheek Bank v. Berry* (Idaho), 89 Fed. Rep. 408.

MORTGAGES, EARNINGS UNDER RECEIVER, RIGHTS OF LESSEE: One who leases mining property from a corporation with full knowledge of a prior mortgage thereon, which is contested by the corporation, takes subject to all rights of the mortgagee; and, where the validity of the mortgage is sustained, he is not entitled to claim the proceeds of the mines while operated by a receiver appointed in a foreclosure suit, as against the mortgagee, on the ground that he expended money to render them productive.

MINING PARTNERSHIPS, LIEN OF PARTNERS: The law of mining partnerships, as declared by the courts or by the statutes of Idaho, does not entitle a mining partner to a lien on the product of a mine for his share of the profits made by his partners while he was excluded from the property, as against the mortgagee of the interests of such partners, although he will be entitled to his share of the product while the mine is operated by a receiver

appointed in a suit to foreclose the mortgage. (Appeal from Circuit Ct. U. S. Dist. of Idaho.)—*G. V. B. Min. Co. v. First Nat. Bank of Hailey*, 95 Fed. Rep. 35; same case in circuit court, see 89 Fed. Rep. 449.

Proceeding for foreclosure of equity of redemption, as understood where the common law view of mortgages is maintained, is unknown, and the mortgagee can in no case become the owner of the mortgaged premises other than by purchase and conveyance under a sale in pursuance of a judicial decree.—*Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540, and the same doctrine was applied to a deed, absolute in form, intended as a mortgage.—*Jackson v. Lodge*, 36 Cal. 28; *Brandt v. Thompson*, 91 Cal. 461, 27 Pac. 763.

VENDOR'S LIEN: It is a well settled rule, that the vendor of real estate has an equitable lien on the land sold for the payment of the purchase money, even where the title has been fully conveyed, if he has taken no security for its payment; and the rights of a vendor who has not conveyed title, can not be of less efficacy. His position is analagous to that of a mortgagee, and he may enforce his rights in the same manner.—*Salmon v. Hoffman*, 2 Cal. 138, 56 Am. Dec. 322; *Tripp v. Duane*, 74 Cal. 91, 15 Pac. 439, see also *Central Pacific R. R. Co. v. Mudd*, 59 Cal. 585.

cific R. R. Co. v. Mudd, 59 Cal. 585.

Deed of trust is not a mortgage requiring foreclosure when given to secure a debt of the grantor with power to the grantee to sell. Such a deed passes the legal title in trust subject to the agreement, and the contract is that the trustee shall sell upon the happening of the event.—*Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651 and note; see also *More v. Calkins*, 95 Cal. 437, 30 Pac. 583, 29 Am. St. Rep. 129; *Bateman v. Burr*, 57 Cal. 480.

Note pledged as collateral may, under special circumstances, as, where the maker resides in a remote country, or in a different state, and is not shown that he has any property subject to seizure and sale, within the jurisdiction of the forum, or where he becomes insolvent, etc., be sold under order of the court in foreclosure proceedings.—*Donohoe v. Gamble*, 38 Cal. 341, 99 Am. Dec. 399; see also note 47 Am. St. Rep. 617.

Mortgage executed by a decedent may be foreclosed in the district court, although the mortgage has been presented as a claim against the estate, but judgment against the general estate can not be had in such case.—*Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140; see also Sec. 4143 and note.

The provisions of the section, that there can be but one action for the recovery of any debt secured by mortgage held under the facts in the case not to prevent recovery against endorser of negotiable paper, even though the remedy may be precluded against the maker.—*Carver v. Steele*, 116 Cal. 116, 47 Pac. 1007, 58 Am. St. Rep. 156.

STATUTE OF LIMITATIONS: When an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the statute of limitations, the remedy upon the mortgage is also barred.—*McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754; *Allen v. Allen*, 95 Cal. 197, 30 Pac. 213. Distinguished in *Gibson v. Charter Oak Ins. Co.* 142 U. S. 337 (12 S. Ct. Rep. 277); where the instrument created an express trust. Entry of mortgagee into possession of mortgaged premises can not, as between him and the mortgagor, operate to extend the statutory period within which an action for the enforcement of the mortgage is barred. Right of action for redemption of mortgaged property from lien of mortgage, when barred by the statute of limitations, can not be revived by an offer of the mortgagor to pay the debt. The mortgagee's right of action on the debt and to enforce the mortgage given to secure it, and the mortgagor's right of action for the redemption of the property from the mortgage lien, are mutual and reciprocal, and when one is barred by the statute of limitations, the other is also.—*Cunningham v. Hawkins*, 24 Cal. 403, 85 Am. Dec. 73; but see *Raynor v. Drew*, 72 Cal. 311, 13 Pac. 866; *Hall v. Arnott*, 80 Cal. 355, 22 Pac. 200; *Allen v. Allen*, 95 Cal. 197, 30 Pac. 213.

A mortgagor who has placed his mortgagee in possession of the mortgaged premises can not maintain ejectment against him while the debt for which the mortgage was given remains unsatisfied, even though an action by the mortgagee for the recovery of the debt is barred by the statute of limitations.—*Spect v. Spect*, 88 Cal. 437, 26 Pac. 203, 22 Am. St. Rep. 314; *Boyce v. Fisk*, 110 Cal. 107, 42 Pac. 473.

PARTIES, GENERALLY, OBJECT OF ACTION: The object of a suit to foreclose a mortgage, under our law, is to obtain a sale of the estate, which the mortgagor held at the time he executed the mortgage, and the application of the proceeds of the sale to the payment of the demand, for the security of which the mortgage was given. All persons who are beneficially interested, either in the estate mortgaged or the demand secured, are proper parties to the suit. This rule, as a general thing,

will only embrace the mortgagor and mortgagee, and those who have acquired rights or interests under them. Where prior incumbrancers are made parties, it is only for the purpose of liquidating the amount of their demands, and paying them out of the proceeds of the sale. Adverse titles to the premises held by parties claiming by conveyance from the mortgagor prior to the mortgage, or from third parties prior or subsequent to the mortgage, are not the proper subjects of determination in the suit. Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance.—*San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187; *McComb v. Spangler*, 71 Cal. 423, 12 Pac. 347.

As to the litigation of paramount titles in a suit to foreclose a mortgage: See note 68 Am. St. Rep. 354-362; *Cody v. Bean*, 93 Cal. 578, 29 Pac. 223.

Cestui que trust is necessary party to suit for foreclosure of a mortgage executed by a trustee upon the trust estate; and if such cestui que trust be a married woman, her husband is also a necessary party.—*Mavrich v. Grier*, 3 Nev. 52, 93 Am. Dec. 373.

HOMESTEAD, HUSBAND AND WIFE: Where the homestead was claimed by the husband, in an action in which he was alone defendant, to foreclose a mortgage made by him alone, since marriage, neither the rights of the husband or wife could be affected by the proceedings in that case, the wife not being a party. Legal proceedings, to be conclusive against either, must embrace both.—*Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304; *Watts v. Gallagher*, 97 Cal. 47, 31 Pac. 626.

The status of the husband and wife as to the homestead is sui generis; and a foreclosure as to one of the spouses is ineffectual for any purpose, without the joinder of the other, except in those cases where the homestead has a value in excess of five thousand dollars.—*Brackett v. Banegas*, 116 Cal. 278, 48 Pac. 90, 58 Am. St. Rep. 158.

All persons interested in the premises prior to the suit brought to foreclose a mortgage or to enforce a mechanic's lien, whether purchasers, heirs, devisees, remainder-men, reversioners, or incumbrancers, must be made parties, otherwise their right will not be affected.

Persons who acquire interest by conveyance or incumbrance after suit brought, need not be made parties.—*Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748; *Goodenow v. Ewer*, 16 Cal. 468; see also *Carpenter v. Brenham*, 40 Cal. 238.

Mortgagor who conveys land mortgaged to one who assumes payment of the mortgage debt may, after such debt becomes due, and without first paying it, file his bill in equity to compel a foreclosure and payment. He is a security for the payment of the debt by his grantee, and will be liable in case the latter fails to pay, or the premises do not bring the amount of the mortgage debt.—*Abell v. Coons*, 7 Cal. 105, 68 Am. Dec. 229; *Kreling v. Kreling*, 118 Cal. 419, 50 Pac. 546.

Purchaser at sale in pursuance of decree of foreclosure of mortgage may maintain a proceeding in the nature of a suit to foreclose an equity of redemption held by a subsequent incumbrancer who was not made a party to the original suit to enforce the mortgage. Such incumbrancer may be called upon to assert his right by virtue of his lien, and his equity or redemption, extending to the period provided by the statute of limitations, be thus reduced to the statutory period of six months.—*Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; see also *Brackett v. Barnegas*, 116 Cal. 284, 48 Pac. 90; *Terril v. Allison*, 21 Wall. 293.

HOMESTEAD, REFORMATION OF MORTGAGE UPON: If a husband and wife agreed to mortgage their homestead, and executed a mortgage which they knew did not include the whole thereof, but which they knew was accepted by the mortgagee in the belief that it included all of such homestead, such mortgage may be reformed in equity so as to include all the land which was agreed to be mortgaged.

MARRIED WOMAN, REFORMATION OF INSTRUMENTS EXECUTED BY: If a married woman executes in the manner prescribed by law a conveyance or other writing, she bears the same relation to it and to the rights and remedies under it as any other contractor, including the right of the other contracting party to have it reformed under the same circumstances which would entitle him to such reformation had the writing been executed only by a man or by an unmarried woman.—*Stevens v. Holman*, 112 Cal. 345, 44 Pac. 670, 53 Am. St. Rep. 216.

JOINDER OF CAUSES OF ACTION: Complaint in action to foreclose mortgage and to reform the certificate of acknowledgment of a notary thereto states but one cause of action.—*Hutchinson v. Ainsworth*, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

Where plaintiff has two mortgages on the same property—the property being indivisible—and one of the mortgages is not due, he may, nevertheless, file

his bill and have a decree for the foreclosure of both. And if the second mortgage becomes due before the decree, then defendant can not defeat the action as to this mortgage by tendering the money due on the first mortgage, after the maturity of the second. The jurisdiction of the court over the subject matter having attached, the court should close the controversy by settling all things involved in the litigation.—*Hawkins v. Hill*, 15 Cal. 499, 76 Am. Dec. 499; affirmed in *Bostwick v. McEvoy*, 62 Cal. 496, citing Sec. 3333.

A complaint to recover on a note, and to foreclose a mortgage given to secure it, does not state two separate causes of action; and plaintiff may be entitled to recover judgment on the note, although the mortgage is void.—*American Savings, Etc. Ass'n. v. Burghardt*, 19 Mont. 323, 48 Pac. 391, 61 Am. St. Rep. 507.

SURPLUS AVERMENT IN COMPLAINT: If the complaint in a foreclosure suit avers that the mortgage was executed by the defendant (thereby making it by averment a legal mortgage), and also sets out a copy of the same, and it appears on its face not to be a legal as distinguished from an equitable mortgage, the averment may be rejected as surplusage.

RELIEF GRANTED WHEN MORTGAGE IS SET OUT IN COMPLAINT. If the complaint avers that the mortgage sought to be foreclosed was made by the defendant, and contains a copy of it, and also avers facts making it an equitable mortgage, and it appears to be in fact an equitable mortgage, the plaintiff is entitled to have it enforced as such.—*Love v. Sierra Nevada Lake Water and Mining Co.* 32 Cal. 639, 91 Am. Dec. 602.

Appointment of receivers in foreclosure proceedings: See generally, Sec. 3318 and note.

Not of growing crops or rents and profits unless mortgage expressly includes.—*Guy v. Ide*, 6 Cal. 99, 65 Am. Dec. 490; *Simpson v. Ferguson*, 112 Cal. 180, 44 Pac. 484, 53 Am. St. Rep. 201.

DECREE IN FORECLOSURE CONCLUSIVE: The decree in an action to foreclose a mortgage concludes the rights of all parties to the action, and the sale under it, consummated by the sheriff's deed, passes, as against them, the entire estate held by the mortgagor at the date of the mortgage. The purchaser as against such parties is entitled upon the receipt of his deed to the possession of the premises, and, if necessary, to the aid of the court in enforcing its delivery—and his right to this aid is not affected by the fact that pending the action the plaintiff may have executed to one of the parties de-

fendant a conveyance of the whole or a portion of the premises embraced in the decree.—*Montgomery v. Middlemiss*, 21 Cal. 103, 81 Am. Dec. 146; *Sichler v. Look*, 93 Cal. 610, 29 Pac. 220.

ACTION AGAINST PERSONAL REPRESENTATIVES DOES NOT AFFECT INDIVIDUAL RIGHTS: Where a surviving wife is sued solely as the executrix of her deceased husband, in an action to foreclose a mortgage executed by him a judgment of foreclosure can not affect the individual rights that she has in the mortgaged property as a homestead, notwithstanding in her answer as executrix she sets up the fact of the declaration of a homestead on the property.—*Building and Loan Ass'n v. Chalmers*, 75 Cal. 332, 17 Pac. 229, 7 Am. St. Rep. 173.

LITIGATION OF ADVERSE INTERESTS: While adverse interests can not properly be litigated in foreclosure, yet if they are put in issue, tried and determined, the judgment is not void on a collateral attack.—*Johnston v. S. F. Savings Union*, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129.

Foreclosing prior mortgage of record, bars tenant, though rent is paid in advance.—*Harris v. Foster*, 97 Cal. 292, 32 Pac. 246, 33 Am. St. Rep. 187.

UNRECORDED INSTRUMENTS: Provision making decree conclusive against persons whose conveyances or liens are not of record applies only to those holding from or under the mortgagor and not to the claimant of a title adverse to that of the mortgagor, such as a purchaser at a tax sale.—*Wilson v. California Bank*, 121 Cal. 630, 54 Pac. 119.

ATTORNEY FEES: It is competent for the parties to stipulate in a mortgage that a certain sum or percentage shall be allowed the mortgagee for attorneys' fees in case of suit, but this sum must be reasonable.—*Cox v. Smith*, 1 Nev. 161, 90 Am. Dec. 476.

A judgment of foreclosure which describes the mortgaged premises as a tract of land described by metes and bounds, with the exception of such portion thereof as are described in certain conveyances on record in the county recorder's office, and to which specific reference is made for a further description, is not void for uncertainty, and can not be collaterally attacked. And a sheriff's deed founded thereon, containing the same description, is sufficient to pass title to the mortgagor.—*De Sepulveda v. Baugh*, 74 Cal. 468, 16 Pac. 223, 5 Am. St. Rep. 455.

DECREE, AMENDMENT OF CLERICAL MISTAKE: In an action to foreclose a mortgage, clerical misprisions in the findings to the amount due on

the note, and in the decree as to the description of the property, which are apparent upon the record, may be corrected by the court on its own motion, with or without notice, and the fact that no notice was given of such amendment is not ground of reversal upon appeal.—*Dickey v. Gibson*, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321.

A deficiency judgment, based upon a complaint not praying for personal judgment and amended after decree, without notice, is void.—*Scammon v. Bonslett*, 118 Cal. 93, 62 Am. St. Rep. 226, 50 Pac. 272.

An action may be maintained by a judgment creditor to enforce a judgment for the foreclosure of a mortgage, declaring the indebtedness therein ascertained to be a lien upon the mortgaged land and directing a sale of the land to satisfy the indebtedness, although he may have a remedy for the enforcement of the judgment by a sale within five years from its entry.

There is but one form of civil action for the enforcement of a private right, and the rules which under the chancery practice prevents the enforcement of a decree in equity by a proceeding at law is inapplicable.—*Rowe v. Blake*, 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45.

Sec. 681, Cal. Code of Civil Procedure (3531 Idaho), limiting execution to five years after the entry of judgment applies to order of sale upon foreclosure proceedings. Sec. 685 Cal. (3535 Idaho) allowing execution after five years upon motion, etc., applies only to judgments requiring the performance of some specific act.—*Dorland v. Hanson*, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 44. Nor can an order for the sale of the mortgaged premises issue after five years, even though judgment for deficiency was expressly waived by stipulation of the parties.—*Jacks v. Johnson*, 86 Cal. 384, 24 Pac. 1057, 21 Am. St. Rep. 50.

Foreclosure suit is merely proceeding for legal determination of the existence of the mortgage lien, the ascertainment of its extent, and the subjection to a sale of the estate pledged for its satisfaction.

In foreclosure suit the owner of the estate, whether mortgagor or his grantee, has a right to be heard upon the validity and extent of the lien, and no valid decree for a sale can pass until this right has been afforded him; and a decree for a sale, where the mortgagor has transferred his interest to another prior to the suit, the grantee not being made a party thereto, is void, in so far as it orders a sale.

The doctrine of caveat emptor is applicable only to sales upon valid judg-

ments, and is usually invoked with reference to sales upon execution issued against the general property of the judgment debtor. In such case, a defect of title is no ground for interference with the sale, or for a refusal to pay the price bid, as the purchaser takes upon himself all the risks as to title, and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy or lien of the judgment, and that he may possibly acquire nothing.

Valid decree for sale on foreclosure on mortgage operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. As to what such interest may be, the purchaser takes the risk, and to that extent the doctrine of caveat emptor applies in such cases.

Purchaser at sale under decree in foreclosure suit may petition to be released from his purchase, or that the sale be set aside, where it has been subsequently discovered that the court rendering the decree had not acquired jurisdiction of the subject matter, or of the persons having interests in the property, or for other reasons that the estate decreed to be sold will not pass.

Action will not lie by purchaser at foreclosure sale against mortgagee to recover back the money paid on his bid, on the ground that the decree for a sale was void because the grantee of the mortgagor was not made a party, if the purchaser was aware, at the time of his bid that the mortgagor had sold his premises before the institution of the foreclosure suit, as the purchaser, in such case, makes a mistake of law as to the effect of the decree when the grantee of the mortgagor is not made a party to the suit; and from such mistake no relief can be granted in an action at law.

Purchaser at foreclosure sale, seeking relief on ground of invalidity of decree of foreclosure and sale, can only obtain it by proceedings in the foreclosure suit. He may apply for such relief as the facts of the case may justify, and upon his application the court may direct the sale to be set aside, the satisfaction to be cancelled, and authorize a supplemental bill, bringing in the grantee of the mortgagor or other parties; or it may make such other and different order in the matter as will protect the rights of all parties, and be just and equitable.

Equity will not relieve from mistake in law, in independent action brought therefor, unless special circumstances, such as undue influence, misrepresentation, or misplaced confidence, are

shown.—*Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561.

In a foreclosure suit, the decree will not apportion the debt among several co-tenants of the land, who acquired undivided interests therein at the same time, and subsequent to the execution of the mortgage.—*Pierre v. Castro*, 14 Cal. 519, 76 Am. Dec. 444.

ESTOPPEL BY SILENCE: When a person knowingly, though passively looks on and suffers another to purchase and expend money on the land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to assert his legal right against such person.—*Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340; *Gratton v. Wiggins*, 23 Cal. 37.

Third mortgagee's title becomes absolute, and second mortgage is cut off, by a purchase at a foreclosure sale under the first mortgage, by such third mortgagee, and obtaining a sheriff's deed thereunder. It would be the same thing if prior to the sale under the first mortgage the third mortgagee obtained the legal title.—*Gibson v. Chedic*, 1 Nev. 497, 90 Am. Dec. 503.

EXECUTION SALE, RIGHTS OF PURCHASER: The purchaser at an execution sale, before conveyance to him, has a right to redeem the property sold on the enforcement of the prior lien; after conveyance to him he has the same right as successor in interest to the debt or mortgagor.—*McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655.

REDEMPTION BY JUNIOR MORTGAGEE: A junior mortgagee, not made a party to a suit for foreclosure of a prior mortgage, has the statutory right of redemption within six months from a sale made under a decree in such suit, and retains also the general equitable right of redemption which exists independent of the statute. If made a party to the foreclosure suit, his equitable right of redemption is barred, but he is still a redemptioner under the statute. Although the decree ascertains the amount of his lien and directs its payment out of any surplus proceeds of the sale remaining after satisfaction of the prior lien, his statutory right to redeem is not thereby destroyed, but still exists as to any portion of his demand not satisfied by the application of the surplus proceeds of the sale.—*Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149.

A mortgagor can not renounce beforehand his privilege to redeem, nor can he by any form of words make a valid executory contract to preclude himself from redeeming; though he may for a sufficient consideration execute a subsequent conveyance or release of the right of redemption to the mortgagee.—

Bradbury v. Davenport, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 92.

Mortgagee may purchase equity of redemption, after decree and before sale. Unless mortgagee is in possession there are no fiduciary relations between mortgagor and mortgagee affecting the right of mortgagee to negotiate a purchase of the rights of the mortgagor.—*De Martin v. Phelan*, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115.

SALE WITHOUT FORECLOSURE: Where, under a sale by virtue of a power of sale, without foreclosure proceedings, the mortgagee becomes purchaser, the equity of redemption still attaches to the property and in such case the mortgagor has a clear right to redeem.—*Benham v. Shaefer*, 2 Cal. 387, 56 Am. Dec. 343.

REDEMPTION, PURCHASER INCREASING THE AMOUNT OF HIS BID: Equity will not assist one person to profit by the mistake of another. Hence, where a party by mistake bid for land at a foreclosure sale a less sum than was due thereon, and he, on discovering such mistake, increased his bid to the full amount due, which amount he paid, it was held that a court of equity would not compel such purchaser to accept a redemption based on the original sum, which he had thus mistakenly bid, but would grant relief only on the condition that the complainant pay the whole sum which was legally chargeable on his land.—*Weyant v. Murphy*, 78 Cal. 278, 20 Pac. 568, 12 Am. St. Rep. 50.

Sheriff's deed containing necessary recitals is good, though the officer who took the acknowledgment does not certify that the sheriff acknowledged it as sheriff, but simply as an individual act. Recitals in a sheriff's deed determine its character; and if they show that the officer was acting in his official capacity, and by due authority, in making the deed, it is valid as soon as properly signed and delivered, though it has not been acknowledged.—*Matter of Smith*, 4 Nev. 254, 97 Am. Dec. 531.

JUDGMENT FOR DEFICIENCY: PUBLICATION OF SUMMONS: In an action to foreclose a mortgage, the court by constructive service of the summons by publication against a non-resident mortgagor does not thereby acquire jurisdiction to enter or docket a personal judgment against the mortgagor for any deficiency left unpaid by the proceeds of the sale, and such personal judgment if entered and docketed is void.—*Blumberg v. Birch*, 99 Cal. 416, 34 Pac. 102, 37 Am. St. Rep. 67, and no valid sale can be made under an execution issued thereon.—*Latta v. Tutton*, 122 Cal. 299, 54 Pac. 844, 68 Am. St. Rep. 30.

DEFICIENCY JUDGMENT, ASSUMPTION OF DEBT BY GRANTEE: Where a mortgagor had sold and conveyed the mortgaged premises to third parties, who assumed and agreed to pay the mortgage debt, but failed to do so, an agreement of the mortgagee not to take any deficiency judgment against the mortgagor in an action to foreclose the mortgage, is without consideration, and the mortgagor, after having made default in the foreclosure suit, upon the faith of such agreement, but without having any legal defense, can not enjoin the enforcement of a deficiency judgment docketed against him in violation of the agreement.—*Heim v. Butin*, 109 Cal. 500, 42 Pac. 138, 50 Am. St. Rep. 54.

TRUST DEEDS, SALE UNDER, ACTION FOR DEFICIENCY: If property is sold under a power in a trust deed, the amount realized at the sale may properly be treated as a payment on the note; and the holder may maintain an action to enforce payment of the balance remaining unpaid and unsecured, although the statute provides that there can be but one action for the enforcement of any right secured by mortgage.—*Mallory v. Kessler*, 18 Utah, 4, 72 Am. St. Rep. 765, 54 Pac. 892.

IMPAIRMENT OF SECURITY: An action for damages will lie in favor of a mortgagee whose security is impaired by the removal of fixtures permanently attached to the realty, against the person or persons removing the same; and a complaint against the mortgagor and another defendant claiming to be a purchaser of the fixtures, alleging that they removed such fixtures well knowing that they would thereby impair and render insufficient plaintiff's security, and that it was thereby rendered insufficient, that the mortgagor is insolvent, and that after foreclosure of the mortgage, an unsatisfied personal judgment remains for a deficiency, states a cause of action.—*Lavenson v. Standard Soap Co.* 80 Cal. 245, 22 Pac. 184, 13 Am. St. Rep. 147, and note.

CONDITION OF EQUITABLE RELIEF: Where the interest of a mortgagor escapes being bound by a decree in foreclosure through a slip in the proceedings, and he subsequently comes into equity to be relieved of the cloud cast upon his interests by reason of such proceedings, he will be required, as a condition of relief, to pay his proportion of the mortgage debt.—*Johnston v. S. F. Savings Union*, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129.

A mortgage carries with it the after acquired title of the mortgagor.—*Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449.

MORTGAGE OF PUBLIC LANDS: If one who is in possession of public lands mortgages the same in fee, and afterwards acquires title to the same under the Federal Homestead Act, he is estopped from denying the lien of the mortgage, and can not set up a title afterwards voluntarily acquired to defeat it.—*Kirkaldie v. Larrabee*, 31 Cal. 455, 85 Am. Dec. 205; *Orr v. Stewart*, 67 Cal. 277, 7 Pac. 693.

MORTGAGE OF PRE-EMPTION CLAIM: In an action to foreclose a mortgage on a pre-emption claim on public land, evidence of the purpose for which the money was borrowed is admissible and material to show that the mortgagor was acting in good faith and not in collusion with the mortgagee to convey the title or to evade any provision of law.—*Norris v. Heald*, 12 Mont. 282, 33 Am. St. Rep. 581, 29 Pac. 1121.

Where a mortgage is made to secure the purchase price of land, no homestead can thereafter be carved out of the property, so as to impair the rights of the mortgage.—*Van Sandt v. Alvis*, 109 Cal. 165, 41 Pac. 1014, 50 Am. St. Rep. 25.

HOMESTEAD, WHEN SUBJECT TO MORTGAGE: Where A., who is a married man, is occupying premises as the tenant of B., and concludes to purchase the same, and to do so borrows the whole of the purchase money from C., and to secure the payment thereof to C., mortgages the premises to him, but the wife does not sign the mortgage; held, that the homestead right was subject to the mortgage.—*Lassen v. Vance*, 8 Cal. 271, 68 Am. Dec. 322; but see *Van Loben Sels v. Bunnell*, 120 Cal. 683, where mortgage not one for purchase money.

The purchaser of a mortgage can not

be charged with constructive notice of anything subsequent to the mortgage, except its assignment or satisfaction duly entered of record.—*Peters v. Jamestown Bridge Co.* 5 Cal. 334, 63 Am. Dec. 134.

NOTICE OF MISTAKE IN MORTGAGE: The record of a mortgage, in which the land described does not belong to the mortgagor, does not give constructive notice of the mistake to the purchaser of the land owned by the mortgagor, and who has paid the purchase money without actual notice of the mistake. Such mistake can not be corrected against him.—*Davis v. Ward*, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29.

A mere stranger, who voluntarily pays money due on a mortgage, and fails to take an assignment thereof, but allows it to be cancelled and discharged, can not afterwards come into equity, and, in the absence of fraud, accident or mistake of fact, have the mortgage reinstated and himself substituted in the place of the mortgagee.—*Guy v. Du Uprey*, 16 Cal. 195, 76 Am. Dec. 518.

The severance and removal of a house from the freehold changes the character of the house from real to personal property, whether the severance is by the act of God or of man.—*Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90; *Mol-sant v. McPhee*, 92 Cal. 79, 28 Pac. 46.

TENDER, WHEN DOES NOT DISCHARGE LIEN OF MORTGAGE: A tender of the money due on a bond and mortgage, after the law day of the mortgage, and a refusal to accept the money, do not discharge the lien of the mortgage.—*Perre v. Castro*, 14 Cal. 519, 76 Am. Dec. 444; *Himmelmänn v. Fitzpatrick*, 50 Cal. 651; *Rein v. Callaway* (Idaho), 65 Pac. 63.

Section 3332. Surplus Money to be Deposited in Court: If there be surplus money remaining, after payment of the amount due on the mortgage, lien or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.

1887 R. S. Sec. 4521.

Section 3333. Proceedings when Debt Secured Falls Due at Different Times: If the debt for which the mortgage, lien or incumbrance is held is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and

the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

1887 R. S. Sec. 4522.

Section 3334. A Mortgage Must not be Deemed a Conveyance: A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

1887 R. S. Sec. 4523.

DEED, AGREEMENT TO RECONVEY: Deed with agreement to reconvey, held a mortgage, and that in such a case, ejectment will not lie by grantee to obtain possession of land from grantor. The remedy is foreclosure under Section 4520, Rev. St. Idaho.—*Kelley v. Leachman*, 2 Idaho, 112, 29 Pac. 849.

APPLIES TO PERSONAL PROPERTY: A deed or bill of sale of either real or personal property, accompanied by a contemporaneous agreement, written or verbal for a reconveyance of the

same upon payment of consideration, which shows that the conveyance was made to secure indebtedness, is in effect a mortgage.—*Pritchard v. Butler* (Idaho), 43 Pac. 73.

A mortgage, though a conveyance in form, and treated as a conveyance for certain purposes, passes no estate in the land, but only creates a lien upon it, which is an incident of the secured debt, and passes by a simple assignment of the debt.—*Savings & Loan Society v. McKoon*, 120 Cal. 179, 52 Pac. 305.

CHAPTER CXXXIX.

LIENS AND PREFERRED CLAIMS OF MECHANICS AND OTHERS.

LIENS UPON MINES, BUILDINGS, ETC., FOR WORK AND MATERIAL.

Section.

- 3335. Lien for work and material furnished.
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LIENS UPON MINES, BUILDINGS, ETC., FOR WORK AND MATERIAL.

Section 3335. Lien for Work and Material Furnished: Every person performing labor upon or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, sub-contractor, architect, builder or any person having charge of any mining or of the construction, alteration or repair either in whole or in part, of any building or other improvement, as aforesaid shall be held to be the agent of and owner for the purpose of this Chapter: *Provided*, That the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this Chapter.

1899, 5th Ses. p. 147; 1893, 2d Ses. p. 49.

CREDIT GIVEN TO PARTY OTHER THAN OWNER: Where in an action to foreclose a mechanics' lien it conclusively appears from the record that credit was given to the party in possession of the property under an option to purchase, and not to the owner of the property, such liens will not, on the failure of the party in possession, and to whom credit was given, to fulfill his contract, be enforceable against the owner or his property.—*Steel et al. v. Argentine Min. Co. (Idaho)*, 42 Pac. 585.

MATERIALS NOT SOLD FOR SPECIFIC USE: When materials are sold under a general sale, without reference to what use or when they are to be used, held not sufficient to support a mechanic's lien therefor.

Findings of the court examined, and held to warrant a judgment for plaintiff.—*Colorado Iron Works v. Rickenberg (Idaho)*, 43 Pac. 681.

LIEN UPON SECTION OF A CANAL: A party constructing a branch or section of a main canal, or performing labor thereon in its construction, under a contract with the owner, is entitled to a lien upon such branch or section for any balance due him for such labor.—*Creer v. Cache Val. Canal Co. (Idaho)*, 38 Pac. 653; see also *Pacific R. M. Co. v. Bear Valley L. Co.*, 120

Cal. 94, 52 Pac. 136, 65 Am. St. Rep. 158 and note.

MECHANIC'S LIEN, ASSIGNMENT: The mere right of a laborer or materialman to assert and create a lien under the mechanic's lien law is a personal right, and can not be assigned. The rule that the assignment of a debt carries with it the lien by which it is secured, if applicable at all to a mechanic's lien, does not apply, where, at the time of the assignment of the debt of a laborer or materialman, the assignor had merely a personal right to create a lien by complying with the statute.—*Mills v. La Verne Land Co.*, 97 Cal. 254, 32 Pac. 169, 33 Am. St. Rep. 168 and note. A perfected lien may be assigned, but the mere right to a lien in the present or future is not assignable.—*Rauer v. Fay*, 110 Cal. 361, 42 Pac. 902.

CONTRACTOR OR MATERIALMAN: A person who contracts with the owner of a building in process of construction to set up therein mantels already put together, the labor of delivering and setting up the mantels being small, as compared with their value, is, within the meaning of the mechanic's lien law, a materialman, and not an original contractor. The main consideration in determining whether the contract is one of construction, or of sale of materials, is whether

the labor bestowed upon placing the materials in the building is trifling in comparison with the price of the materials, or whether the materials are trifling in comparison with the labor.—*Bennett v. Davis*, 113 Cal. 337, 45 Pac. 684, 54 Am. St. Rep. 354.

LIEN, MONEY ADVANCED AS A LOAN: Mechanic's lien law provides exclusively for security of materialmen and laborers, and one who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can claim no benefit of the law. But where money is advanced for the erection of a building, it will take priority over a mortgage on the premises, where the holder of the mortgage invites the expenditure and asserts that the person advancing the money shall be protected.—*Godeffroy v. Caldwell*, 2 Cal. 489, 56 Am. Dec. 360.

MINING CLAIM, PRESUMPTION OF AGENCY OF OWNER: The presumption raised by this section in favor of one performing labor on a mining claim that the person having charge of the mining was the agent of the owner, may be rebutted; and one

doing such work, with the knowledge that the person having charge of the mining did not own the property, and was not working the mine as the owner's representative, is not entitled to a lien thereon on any theory of his employer's agency.—*Jurgenson v. Diller*, 114 Cal. 491, 46 Pac. 610, 55 Am. St. Rep. 83.

MECHANIC'S LIEN, GUARDIAN AND WARD: A mechanic's lien can not be enforced against the property of minors, where the contract under which the work was done or materials furnished was entered into on their behalf by their guardian without first obtaining an order of court authorizing him to do so; such lien can not exist, except where there was a valid contract for doing the work or the furnishing of materials.—*Fish v. McCarthy*, 96 Cal. 484, 31 Pac. 529, 31 Am. St. Rep. 237.

One who sells material to a materialman can have no lien therefor, as the statute makes no provision for such a lien.—*Roebling's S. Co. v. Humboldt, Etc. Co.* 112 Cal. 288, 44 Pac. 568; *Idaho Gold Mining Co. v. Winchell et al.* (Idaho), 59 Pac. 533.

Section 3336. Lien on Municipal Buildings, Etc.:

Every sub-contractor, laborer or other person, who performs labor or furnishes material for any original contractor or sub-contractor, to be used in the construction, alteration or repair of any building, machinery or other structure, for any county, city, town or school district has a lien upon such building, machinery or structure, and all the provisions of this Chapter respecting the securing and enforcing of mechanic's lien shall apply thereto thereto, so far as applicable.

1899, 5th Ses. p. 147; 1893, 2d Ses. p. 49.

Section 3337. Lien on Lot for Grading, Filling, Etc.:

Any person who at the request of the owner of any lot in any incorporated city or town grades, fills in, or otherwise improves the same or the street in front of or adjoining the same, has a lien upon such lot for his work done or material furnished.

1899, 5th Ses. p. 147; 1893, 2d Ses. p. 50.

The lien provided for in this section in favor of one who, at the request of the owner of a lot, improves the street

or sidewalk in front of or adjoining the same, can be acquired and enforced only against a lot in an "incorporated city or town."—*Durrell v. Dooner*, 119 Cal. 411, 51 Pac. 468.

Section 3338. What Land or Interest Subject to Lien:

The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof to be determined by the court on rendering judgment, is also subject to the lien, if, at the commencement of the work or of the furnishing of the material for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired, but if such person owns less than a fee simple

estate in such land, then only his interest therein is subject to such lien.

1899, 5th Ses. p. 148; 1893, 2d Ses. p. 50.

Upon the foreclosure of a mechanic's lien upon a dwelling house the extent of land to be taken with the dwelling house is only what is required for the convenient use and occupation of the dwelling house, and the statute does not contemplate that sufficient land

around the dwelling house to support the owner while living there should be set apart, and it is error for the court to set apart forty acres of land around the dwelling house, as being required for convenient use and occupation.—*Cowan v. Griffith*, 108 Cal. 224, 41 Pac. 42, 49 Am. St. Rep. 82.

Section 3339. Mechanic's Liens Preferred Claims to What Extent:

The liens provided for in this Chapter are preferred to any lien, mortgage or other incumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance, of which the lien holder had no notice, and was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished.

1899, 5th Ses. p. 148; 1893, 2d Ses. p. 51.

EVIDENCE, MORTGAGE LIEN, PRIORITY: Record examined, held, that under the evidence, the court erred in finding that labor was performed at the instance and request of appellant, or that he in any manner waived the lien created by his chattel mortgage in favor of the respondent's liens for labor, and also erred in holding that respondent's liens were prior to the mortgage lien of appellant.—*Rourke v. Bergevin* (Idaho), 44 Pac. 645.

MORTGAGE, PRIORITY, NOTICE: The lien of a materialman for lumber furnished for a dwelling house will take precedence of a mortgage of the land executed immediately upon a conveyance therefor, but after the time when the materials were commenced

to be furnished, notwithstanding the mortgage was given for the purchase price of the land to a vendor who had sold it to the mortgagor prior to the furnishing of any materials, and who had conveyed it to the mortgagor on the same day that he received his own deed from a prior vendor from whom he had purchased it.

If a building is constructed on lands with the knowledge of a person having or claiming any interest therein, such interest is subject to such lien, unless he gives notice that he will not be responsible, and if he afterwards makes a conveyance of the property, taking a mortgage to secure the payment of part of the purchase price, his mortgage is subordinate to the mechanic's lien.—*Avery v. Clark*, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272 and note.

Section 3340. Claim of Lien, When Filed and What

to Contain: Every original contractor claiming the benefit of this Chapter must, within ninety days, and every other person must, within sixty days, after the completion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or in case he ceases to labor thereon before the completion thereof, then after he so ceases to labor or after he has ceased to labor thereon for any cause, or after he has ceased to furnish materials therefor, or after the performance of any labor in a mine or mining claim, filed for record with the county recorder for the county in which such property or some part thereof is situated a claim containing a statement of his demand, after deducting all just credits and offsets with the name of the owner, or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien, sufficient for identification, which

claim must be verified by the oath of the claimant, his agent or attorney to the effect that the affiant believes the same to be just.

1899, 5th Ses. p. 148; 1895, 3d Ses. p. 48.

NOTICE OF CLAIM, SUFFICIENCY: A notice of mechanic's lien which fails to state unequivocally and plainly the name of the owner or reputed owner, or the terms, time and condition of the contract under which the labor was performed, is fatally defective.

SAME: A statement at the head of the notice of W. & M. sub-Contractors v. B., contractor, and M., owner, is not in compliance with the statute requiring that the name of the owner or reputed owner should be stated in the lien.—*White v. Mullins*, 2 Idaho, 1164, 31 Pac. 801.

STATEMENT OF NAME OF OWNER: A statement in the notice of lien that the mines upon which labor was performed or materials were furnished "was the property of the defendant," is not such an allegation as is required by the statutes. (Sec. 5130 R. S. containing same requirements as above section.)—*Steel et al. v. Argentine Min. Co. (Idaho)*, 42 Pac. 585.

MATERIALMAN, TIME TO FILE: A materialman who contracts directly with the owner, and has no privity of interest or contract with the contractor for construction, is an original contractor, under the statutes of Idaho, and is entitled to the time provided by statute for such within which to file his lien.—*Colorado Iron Works v. Reckenberg (Idaho)*, 38 Pac. 651.

MECHANIC'S LIENS, NOTICE, SUFFICIENCY OF: A notice of mechanic's lien which fails to show that the material was furnished for the construction of the building in question, or that any portion of the material was used in the construction, or purchased for the purpose of constructing the building referred to in the notice of lien, and which also fails to show the terms, time given, and conditions of the contract, and which contains no statement, except inferentially, as to what the contract was, how much lumber was purchased, what price was agreed to be paid for it, whether it was purchased or delivered for the purpose of constructing the building in question, or whether it was ever used therein, is insufficient and void. A notice of mechanic's lien must contain and set out, as far as the claimant is able to ascertain and disclose it, the contract between the owner and contractor, so that the price, terms and conditions of the contract may be known as affecting the rights and interests of the sub-contractor and others interested. Otherwise, the notice is insufficient and

void. Essential averments omitted from the notice of a mechanic's lien can not, in an action to enforce the lien, be supplied by averments in the complaint or by extrinsic evidence.—*Morrison v. Willard*, 17 Utah, 306, 53 Pac. 832, 70 Am. St. Rep. 784. A notice of a claim for materials furnished, which states the name of the contractor and of the owner of the building, but does not state to what person the materials were furnished, is insufficient and fatal to the lien, and can not be aided by a statement in the complaint for foreclosure of the name of the person to whom the materials were furnished. The notice of lien which is filed for record must be complete in itself at the time, in order to authorize an enforcement of the lien, and is not capable of being amended or reformed.—*Madera Fiume, Etc. Co. v. Kendall*, 120 Cal. 182, 52 Pac. 304, 65 Am. St. Rep. 177.

MISDESCRIPTION OF PROPERTY IN CLAIM, NOTICE NOT AMENDABLE: Where there is no description in the notice of lien sufficient to identify the mining claim upon which the work was actually done with reasonable certainty, to the exclusion of other premises, the notice of lien is insufficient. The notice of lien is not an instrument susceptible of reformation, and the monuments and lines by which the property is said in the notice to be particularly described can not be expunged from the notice, but must be read as part of it, and are of the essence of the description, and must control it.—*Fernandez v. Burleson*, 110 Cal. 164, 42 Pac. 566, 52 Am. St. Rep. 75.

Notice of mechanic's lien required to be filed in recorder's office need not set out the items of the account, a general statement of the demand, showing its nature and character, being sufficient.—*Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507; *Jewell v. McKay*, 82 Cal. 150, 23 Pac. 139.

Only such facts as are required by this section need be set out in the notice.—*Corbett v. Chambers*, 109 Cal. 178, 41 Pac. 873; but a substantial compliance is sufficient.—*McGinty v. Morgan*, 122 Cal. 103, 54 Pac. 392; *Rauer v. Fay*, 110 Cal. 361, 42 Pac. 902.

REPUTED OWNER: "The owner of real property, may by his acts or conduct, be estopped from questioning the acts of a reputed owner of such property, and may thereby be bound by the acts of such reputed owner; but, in the absence of the elements of an estoppel, he will not be bound by the unauthorized acts of one who is merely

reputed to be the owner of the land. He can not be deprived of his title to the land, nor can a lien be imposed thereon, against his will, by virtue of any agreement or contract on the part of one who is merely reputed to be the owner of such land, unless he has in some way held such person out as the reputed owner, with authority to do the act, or make the agreement by which it is sought to create the lien. It is

no more within the constitutional power of the legislature to authorize a reputed owner of a lot or parcel of land to create a lien thereon, against the will of the real owner, than it would be to authorize such reputed owner to transfer the title to said land."—*Santa Cruz Rock, Etc. Co. v. Lyons*, 117 Cal. 212, 48 Pac. 1097, 59 Am. St. Rep. 174, and note.

Section 3341. Claims Against Two or More Buildings, What to Designate, Effect of: In every case in which one claim is filed against two or more buildings, mines, mining claims, or other improvements, owned by the same person, the person filing such claim must at the same time designate the amount due him on each of said buildings, mines, mining claims, or other improvement, otherwise the lien of such claim is postponed to other liens. The lien of such claim does not extend beyond the amount designated as against other creditors having liens by judgment, mortgage, or otherwise, upon either of such buildings, or other improvements, or upon the land upon which the same are situated.

1899, 5th Ses. p. 148; 1893, 2d Ses. p. 51.

A joint lien for labor done and materials furnished may be filed against two separate buildings erected on the same lot, though erected at different times and under different contracts between the owner and the same original contractors. The failure of the claimant to specify in his claim of lien the amount of labor and material furnished for each building merely has the effect to postpone his lien and to give prece-

dence to other specific liens upon each building, and is of no concern to the owner of the lot.—*Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200; 25 Pac. 1101.

This section has no application to a case where the property on which the labor was performed originally consisted of several mining locations which had been consolidated, and were owned and worked as one mine by the person against whom the lien is filed.—*Tredinick v. Mining Co.* 72 Cal. 78, 13 Pac. 152.

Section 3342. Length of Time Property Bound by Lien: No lien provided for in this Chapter binds any building, mining claim, improvement or structure for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien; or, if a credit be given, then six months after the expiration of such credit; but no lien shall continue in force under this Chapter for a longer period than two years from the time the work is completed, or credit given, unless proceedings to enforce the same shall have been commenced.

1899, 5th Ses. p. 148; 1895, 3d Ses. p. 49.

Section 3343. Contractors May Recover What Rights of Owner and Contractor: The original or sub-contractor shall be entitled to recover upon the claim filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished to him as aforesaid, of which claim of lien shall have been filed as required by this Chapter, and in all cases where a claim shall be filed under this Chapter for work done or materials furnished to any sub-contractor, he shall defend any action brought

thereupon at his own expense; and during the pendency of such action, the person indebted to the contractor may withhold from such contractor the amount of money for which claim is filed; and in case of judgment upon the lien, the person indebted in the contract shall be entitled to deduct from any amount due or to become due by him to such contractor, the amount of such judgment and costs and if the amount of such judgment and costs shall exceed the amount due from him to such contractor, if the person indebted in the contract shall have settled with such contractor in full, he shall be entitled to recover back from such contractor any amount so paid by him in excess of the contract price and for which such contractor was originally the party liable.

1899, 5th Ses. p. 148; 1893, 2d Ses. p. 52.

It is the duty of the contractor to protect the property of the owner against any lien preferred by sub-contractors, laborers or materialmen employed by him; and the owner is entitled to de-

duct from any amount due the contractor the amount of judgment and costs, including attorney's fees recovered against him.—Clancy v. Plover, 107 Cal. 272, 40 Pac. 394; see also Macomber v. Bigelow, 123 Cal. 532, 56 Pac. 449.

Section 3344. Judgment to Declare Priority: In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien or class of liens which shall be in the following order:

First. All laborers, other than contractors or sub-contractors.

Second. All material men, other than contractors or sub-contractors.

Third. Sub-contractors.

Fourth. The original contractor.

1899, 5th Ses. p. 148; 1893, 2d Ses. p. 53, first portion.

Section 3345. Proceeds of Sale, How Applied: In case the proceeds of sale under this Chapter shall be insufficient to pay all lienholders under it;

First. The lien of all laborers, other than the original contractor and sub-contractor, shall first be paid in full, or pro rata, if the proceeds be insufficient to pay them in full.

Second. The lien of material men, other than the original contractor or sub-contractor, shall be paid in full, or pro rata, if the proceeds be insufficient to pay them in full.

Third. And out of the remainder, if any, the sub-contractors shall be paid in full or pro rata, if the remainder be insufficient to pay them in full, and the remainder if any, shall be paid to the original contractor; and each claimant shall be entitled to execution for any balance due him after such distribution such execution to be issued by the clerk of the court upon demand, at the return of the sheriff or other officer making the sale, showing such balance due.

1899, 5th Ses. p. 148; 1893, 2d Ses. p. 53, latter portion.

Section 3346. Materials Furnished. Exemption of, from Attachment or Execution: Whenever materials shall have been furnished for use, in the construction, alteration or repair of any buildings, or other improvement, such materials shall not be

subject to attachment, execution or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof so long as in good faith the same are being applied to the construction, alteration, or repair of such building, mining claim, or other improvement.

1899, 5th Ses. p. 150; 1893, 2d Ses. p. 54.

VENDOR'S AND LABORER'S LIEN UPON LOGS, WOOD AND TIMBER PRODUCTS.

Section 3347. Lien upon Saw-Logs, Etc., for Services:

Every person performing labor upon, or who shall assist in obtaining or securing saw-logs, spars, piles, cord wood, or other timber, has a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. The cook shall be regarded as a person who assists in obtaining or securing the timber herein mentioned.

1899, 5th Ses. p. 150, Sec. 1; 1893 2nd Ses. p. 55.

Section 3348. Lien upon Saw Logs Manufactured

into Lumber: Every person performing labor upon or who shall assist in manufacturing saw-logs into lumber has a lien upon such lumber while the same remains at the mill where manufactured, whether such work or labor was done at the instance of the owner of such logs or his agents.

1899, 5th Ses. p. 150, Sec. 2; 1893, 2nd Ses. p. 55.

Section 3349. Lien for Purchase Price upon Logs,

Etc., Cut on One's Land: Any person who shall permit another to go upon his timber land and cut thereon, saw-logs, spars, piles, cordwood, or other timber has a lien upon such logs, spars, piles, cord wood and timber for the price agreed to be paid for such privilege or for the price such privilege would be reasonably worth in case there was no express agreement fixing the price.

1899, 5th Ses. p. 150, Sec. 3; 1893, 2nd Ses. p. 55.

Section 3350. Preferred Liens, not Divested by Sale

or Transfer: The liens provided for in this Chapter are prior to any other liens, and no sale or transfer of any saw-logs, spars, piles, cord wood or other timber or manufactured lumber shall divest the lien thereon as herein provided, and such lien shall follow such property into any county in this State into which the same may be removed: *Provided*, Notice of such lien shall have been filed in such county.

1899, 5th Ses. p. 150, Sec. 4; 1893, 2nd Ses. p. 55.

Section 3351. Time During which Lienor is Entitled

to Lien: The person rendering the service or doing the work or labor named in Sections 3335 and 3336 of this Chapter is only entitled to the liens as provided herein for services, work or labor, for the period of eight calendar months, next preceding the filing of the claim, as provided in Section 3353 of this Chapter.

1899, 5th Ses. p. 151, Sec. 5; 1893 2nd Ses. p. 55.

Section 3352. Time During which One Granted Privilege is Entitled to Lien: The person granting the privilege mentioned in Section 3349 of this Chapter is entitled to the lien as provided therein for saw-logs, spars, piles, cord wood and other timber cut during the eight months next preceding the filing of the claim, as provided in the next succeeding Section of this Chapter.

1899, 5th Ses. p. 151, Sec. 6; 1893, 2nd Ses. p. 56.

Section 3353. Verified Claim to be Filed: Every person within sixty days after the close of the rendition of the services, or after the close of the work or labor mentioned in Sections 3347 and 3348 of this Chapter, claiming the benefit hereof, must file for record with the county recorder of the county in which such saw logs, spars, piles, cord wood or other timber was cut, or in which such lumber was manufactured, or if removed to another county then in such county, a notice of claim containing a statement of his demand, and the amount thereof, after deducting as near as possible, all just credits and offsets, with the name of the person by whom he was employed.

1899, 5th Ses. p. 152, Sec. 7, first part.

Section 3354. Requirements and Form of Statement: The notice of claim shall state what such service, work or labor is reasonably worth; and it shall also contain a description of the property to be charged with the lien, sufficient for identification with reasonable certainty, which notice of claim must be verified by the oath of himself, his agent or attorney, to the effect that the affiant believes the same to be true, and such notice of claim shall be substantially in the following form:

.....claimant, vs.
 Notice is hereby given that..... of..... county, State
 of Idaho, claims a lien upon a..... of..... being
 about..... in quantity, which were cut in.....
 county, State of Idaho, are marked thus..... and are
 now lying in..... for labor performed upon and assistance
 rendered in..... said.....; that the name of the
 owner or reputed owner is.....; that..... em-
 ployed said..... to perform such labor and render such
 assistance upon the following terms, to-wit: The said.....
 agreed to pay the said..... for such labor and assistance
; that said contract has been faithfully performed and
 fully complied with on the part of said....., who performed
 labor upon and assisted in..... said..... for the
 period of..... that said labor and assistance were so per-
 formed and rendered upon said..... between the.....
 day of..... and the..... day of
 and the rendition of said services was closed on the
 day of and days
 have not elapsed since that time that the amount of claimant's de-
 mand for said services is.....; that no part thereof has been
 paid except, , , , , , and there is now due and unpaid

thereon, after deducting all just credits and offsets, the sum of.....
in which amount he claims a lien upon said.....

State of Idaho }
..... County. } ss.
....., being first duly sworn, on oath says that he is
.....named in the foregoing claim, has heard the same
read and knows the contents thereof, and believes the same to be
true.....
Subscribed and sworn to before me this.....day of
....., 18....

.....
.....
1899, 5th Ses. p. 152, Sec. 7, last part.

Section 3355. Person Claiming Lien for Purchase Price Must File Claim: Every person mentioned in Section 3349 of this Chapter, claiming the benefit hereof, must, within ninety days after such cutting file for record with the county recorder of the county in which such saw-logs, spars, piles, cord wood, or other timber was cut, a claim in substance, the same as provided in the last two preceding Sections of this Chapter and verified as therein provided.
1899, 5th Ses. p. 152, Sec. 8; 1893, 2nd Ses. p. 57.

Section 3356. Length of Time Lien Binds Property: No lien provided for in this Chapter binds any saw-logs, spars, piles, cord wood or other timber, or any lumber for a longer period than six calender months after the claim as herein provided has been filed, unless a civil action be commenced in a proper court within that time to enforce the same.
1899, 5th Ses. p. 152, Sec. 10; 1893, 2nd Ses. p. 58.

Section 3357. Lien May be Enforced Against Part or Whole of Property: Any person who shall bring a civil action to enforce the lien as herein provided for, or any person having a lien as herein provided for, who shall be made a party to any such civil action has a right to demand that such lien be enforced against the whole or any part of the saw logs, spars, piles, cord wood or other timber or manufactured lumber, upon which he has performed labor or which he has assisted in obtaining or securing, or which has been cut on his timber land during the eight months mentioned in Sections 3351 and 3352 of this Chapter, for all his labor upon, or for all his assistance in obtaining or securing said logs, spars, piles, cord wood or other timber, or in manufacturing said lumber during the whole or any part of the eight months mentioned in Section 3351 of this Chapter, or for timber cut during the whole or any part of the eight months mentioned in Section 3352 of this Chapter.
1899, 5th Ses. p. 152, Sec. 12; 1893, 2nd Ses. p. 58.

Section 3358. Judgments in Lien Cases, Enforcement of: In such civil action judgments must be rendered in favor of each person having a lien for the amount due to him, and

the court or judge thereof shall order any property subject to the lien herein provided for to be sold by the sheriff of the proper county in the same manner that the personal property is sold on execution, and the court or judge shall apportion the proceeds of such sale for the payment of each judgment pro rata, according to the amount of such judgment.

1899, 5th Ses. p. 153, Sec. 14; 1893, 2nd Ses. p. 59.

Section 3359. Personal Property May be Sold to Satisfy Lien, When: The court or judge may order any property subject to a lien as in this Subdivision provided to be sold by the sheriff as personal property is sold on execution, either before or at the time judgment is rendered as provided in the Section next preceding, and the proceeds of such sale must be paid into court to be applied as in such Section directed.

1899, 5th Ses. p. 153, Sec. 15; 1893, 2nd Ses. p. 59.

Section 3360. Liability for Interference with Property Subject to Lien: Any person who shall injure, impair, or destroy, or who shall render difficult, uncertain or impossible of identification, any saw-logs, spars, piles, cord wood, or other timber, upon which there is a lien as herein provided without the express consent of the person entitled to such lien, shall be liable to the lien holder for the damages to the amount secured by his lien, which may be recovered by civil action against such person.

1899, 5th Ses. p. 153, Sec. 16; 1893, 2nd Ses. p. 59.

FARM LABORERS' LIENS.

Section 3361. Farm Laborers' Liens: Priority: Any person who does any labor on a farm or land in tilling the same, or in cultivating, harvesting, or housing any crop or crops raised thereon has a lien on all such crop or crops for such labor, and such lien shall be a preferred and prior lien thereon to any crop or chattel mortgage placed thereon, and all chattel or crop mortgages of any crop or crops, upon which any person shall perform labor in cultivating, harvesting, or housing the said crop, shall take such mortgage subject to, and said mortgage shall be a subsequent lien to that of the person or persons performing such labor as to a reasonable compensation for such labor.

1889, 5th Ses. p. 153, Sec. 1; 1895, 3rd Ses. p. 138.

The lien of a laborer employed to harvest a crop is subject to the prior lien

of a chattel mortgage upon the growing crop.—Wilson v. Donaldson, 121 Cal. 8, 53 Pac. 404, 66 Am. St. Rep. 17.

Section 3362. Lessor's Interest in Crop Excepted: The interest in any crop of any lessor or lessors of land where the premises are leased in consideration of a share of the crop raised thereon is not subject to such lien.

1899, 5th Ses. p. 153, Sec. 1, last part.

Section 3363. Claim to be Verified and Filed. How Enforced: Any person claiming the benefit of Section 3361, must within sixty days after the close of said work or labor filed for rec-

ord with the county recorder of the county in which said work or labor was performed, a claim which shall be in substance in accordance with the provisions of Section 3353 of this Chapter, so far as the same may be applicable, which said claim shall be verified, as provided in Section 3354, and said liens may be enforced in civil action, in the same manner, as near as may be, as provided in Section 3366 of this Chapter.

1899, 5th Ses. p. 153, Sec. 2; 1893, 2nd Ses. p. 60.

GENERAL PROVISIONS RELATING TO LIENS.

Section 3364. County Recorder to keep Record of Liens: The county recorder must record any claim filed under this Chapter in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed and for which he may receive the same fees as are allowed by law for recording deeds or other instruments.

1899, 5th Ses. p. 152, Sec. 9; 1893, 2nd Ses. p. 58.

Section 3365. Claimants may Join in Action. Consolidation. Costs: Any number of persons claiming liens against the same property may join in the same action, and when separate actions are commenced, the court may consolidate them. The court shall also allow as part of the costs the moneys paid for filing and recording the claim, and reasonable attorney's fees.

1899, 5th Ses. p. 150; 1893, 2nd Ses. p. 54.

DAMAGES AND COSTS: Under Code, Sections 815, 827, providing that a mechanic's lien shall only extend to work, labor, material and money paid for recording and filing the lien on an irrigating ditch can not include as damages the cost of protesting and acceptance for the construction of the ditch.—Bradbury v. Idaho & O. Land Co. 2 Idaho, 221, 10 Pac. 620.

ATTORNEY'S FEES: The court may allow a reasonable attorney's fee to each lien claimant whose lien is established, as an incident to the judgment, and the amounts are to be fixed by the court, irrespective of any averment in the complaint; and it is no objection to an allowance fixed by the court, that the sum is in excess of the amount designated in the complaint.—Pacific Mutual L. I. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758. The discretion of the trial judge in fixing the amount of attorney's fees and apportioning the amount between the respective claimants of liens will not be disturbed upon appeal where there is no such abuse of discretion as to warrant interference therewith.—Sweeney v. Meyer, 124 Cal. 512, 57 Pac. 479.

Upon the affirmance of an appeal from a judgment enforcing a mechanic's lien

the supreme court will not make any directions to the lower court respecting the allowance of an attorney's fee for defending the appeal. Under this section that matter rests exclusively with the trial court.—San Joaquin Lumber Co. v. Welton, 115 Cal. 5, 45 Pac. 737 and 1057.

FEDERAL COURTS. JURISDICTIONAL AMOUNT, JOINDER OF CAUSES: Two parties, having claims for labor performed for the same employer, which arose under separate contracts, were supported by separate evidence, and which would result in several judgments, joined their claims in a single suit, seeking to enforce a lien for their claims by virtue of a law of Idaho which allows any number of parties to join in the same action, where they claim liens on the same property. The suit was removed to the circuit court, where it appeared that neither claim amounted to \$2000, though their aggregate exceeded that sum. Held, construing Rev. St. Sec. 914, that their claims were in their nature separate, and that their joinder could not give the federal courts jurisdiction, whatever might be their aggregate amount. (At law. On motion to remand.)—Holt v. Bergevin, 60 Fed. Rep. 1.

Section 3366. Liens may be Enforced by Civil Action, how: Except as otherwise provided in this Chapter, the

provisions of the Code of Civil Procedure of the State of Idaho, relating to civil actions, new trials and appeals are applicable to, and constitute the rules of practice in the proceedings mentioned in this Chapter; *Provided*, That the district courts of this State shall have jurisdiction of all actions brought under this Chapter.

1899, 5th Ses. p. 150; 1893, 2nd Ses. p. 54.

PROCESS, "EXECUTION." "WRIT:" The only process provided for the enforcement of a judgment foreclosing a lien upon specific property is that prescribed by Section 3534, post, requiring a judgment for the sale of property to be enforced by a "writ" reciting a judgment and directing the sale. Such "writ" is not an "execution" within the meaning of Section 3533, post, and a sale of the property by the sheriff is not

invalidated because made after the return day of the writ.—*Southern Cal. L. Co. v. Hotel Co.* 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115.

A homestead is not exempt from a lien in favor of a material man, who furnished the materials to be used in the improvement thereof and can, therefore, be directed to be sold in satisfaction of such lien.—*Bonner v. Minnier*, 13 Mont. 269, 34 Pac. 30, 40 Am. St. Rep. 441.

Section 3367. Right of Action to Recover Debt not Impaired: Nothing contained in this Chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover such debt against the person liable therefor.

1899, 5th Ses. p. 150; 1893, 2nd Ses. p. 54.

LIEN NOT WAIVED BY ATTACHMENT: A party having secured a mechanic's lien under the statute, does not forfeit or waive it, by causing an attachment to be issued and levied upon the property of the debtor to secure the same demand. The two remedies are cumulative, and both may be pursued at the same time.

ELECTION OF REMEDY: If the party attempts to pursue them in separate actions, he might be put to his election; but it is no defense to an action to enforce the mechanic's lien, that in a previous suit for the same debt an attachment was issued and levied upon the property of the debtor, particularly

when such suit had been dismissed, and nothing was realized by the attachment.—*Brennan v. Swasey*, 16 Cal. 140, 75 Am. Dec. 507; *Salt Lake, Etc. Co. v. Ibex, Etc. Co.* 15 Utah, 444; 49 Pac. 768; see also *Bates v. Santa Barbara*, 90 Cal. 548, 27 Pac. 438.

.. The personal action provided for in this section is a simple action upon the contract against the person who is liable therefor, and has no reference to the lien given by the statute. Where the action is to foreclose a mechanic's lien upon the property of the owner the plaintiff may recover the cost of filing the lien and attorney's fees which can not be recovered in a personal action.—*Central L. & M. Co. v. Center*, 107 Cal. 193, 40 Pac. 334.

PREFERRED CLAIMS OF LABORERS, ETC., IN PROCEEDINGS UPON INSOLVENCY, ESTATES, AND EXECUTIONS.

Section 3368. Preferred Creditors on Assignments:

In all assignments of property made by any person to trustees or assignees, or in proceedings in insolvency, the wages of the miners, mechanics, salesman, servants, clerks or laborers for services rendered within sixty days next preceding such assignment not exceeding one hundred and fifty dollars are preferred claims, and must be paid by such trustees or assignees before any creditor or creditors of the assignor or insolvent debtor: *Provided*, That whenever any such miner, mechanic, salesman, servant, clerk or laborer has filed a notice of lien against any property of the assignor, he may elect between the provisions of this Section and his lien.

1899, 5th Ses. p. 154; 1893, 2nd Ses. p. 60.

Section 3369. Preferred Creditors Against Estate:

In case of the death of any employer the wages of each miner, mechanic, salesman, clerk, servant and laborer for services rendered within the sixty days next preceding the death of the employer not exceeding one hundred and fifty dollars, rank in priority next after the funeral expenses; expenses of the last sickness, the charges and expenses of administering upon the estate, and the allowance to the widow and infant children, and must be paid before any other claims against the estate of the deceased person.

1899, 5th Ses. p. 154; 1893, 2nd Ses. p. 61.

Section 3370. Preferred Creditors in Case of Execution and Attachment:

In cases of executions, attachments and writs of similar nature issued against any person or his property, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks or laborers who have claims against the defendant for labor done upon the property levied on may give notice of their claim and the amount thereof, sworn to by the person making the claim, to the creditor or his agent or attorney and the officer executing any of such writs, at any time before the actual sale of the property levied upon; and, unless such claim is disputed by the debtor or creditor, such officer must pay to such person out of the proceeds of the sale of any property on which such person has bestowed labor the amount he is entitled to receive for his services rendered within the sixty days next preceding the levy of the writ.

1899, 5th Ses. p. 154; 1895, 3rd Ses. p. 49, first part.

Section 3371. Disputed Claims, Procedure Upon:

If any, or all other claims so presented and claiming preference under the preceding Section are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days for the recovery thereof and must prosecute his action with due diligence or be forever barred from any claim of priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim until the determination of such action; and in case judgment be had for the claim or any part thereof carrying costs the costs taxable therein shall likewise be a preferred claim with the same rank as the original claim.

1899, 5th Ses. p. 154, Sec. 3, last part.

Section 3372. Debtor or Creditor to File Statement:

The debtor or creditor intending to dispute a claim presented under the provisions of the last Section shall within ten days after receiving notice of such claim, serve upon the claimant and the officer executing the writ, a statement in writing verified by the oath of the debtor or the person disputing such claim, or his agent or attorney, setting forth that no part of said claim or not exceeding a sum specified is justly due from the debtor to the claimant for services rendered within the sixty days next preceding the levy of the writ. If the claimant brings suit on a claim which is disputed in part only, and fail to

recover a sum exceeding that which was admitted to be due, he shall not recover costs, but costs shall be adjudged against him.

1899, 5th Ses. p. 155; 1893, 2nd Ses. p. 62.

CHAPTER CXL:

ACTIONS FOR NUISANCE, WASTE AND WILFUL TRESPASS IN CERTAIN CASES.

Section.

3373. Nuisance defined and actions for.

3374. Waste, actions for.

3375. Trespass for cutting trees, etc., actions for.

3376. Exceptions in certain cases under the last section.

Section.

3377. Damages for forcible entry, etc., may be trebled.

3378. Actions for injury by persons unlawfully brought into the state.

Section 3373. Nuisance Defined and Actions for:

Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

1887 R. S. Sec. 4529.

PUBLIC NUISANCE, INJUNCTION, MAINTENANCE BY PRIVATE PARTY: Equity has jurisdiction to enjoin a public nuisance at the suit of private party, if such nuisance is especially injurious to such private party.

SAME, PLEADING: The complaint should set forth by positive averment, facts sufficient to show that the plaintiff has sustained special injury, different in kind from that sustained by the general public. Then the nuisance becomes as to him a private nuisance.

Section 4529, Rev. St. does not change the rule above stated as to private parties maintaining an action to abate a public nuisance.—*Redway v. Moore*, 2 Idaho, 1036, 29 Pac. 104.

INJUNCTION, PLEADING: In an action to abate a nuisance and enjoin obstruction to a navigable stream, it must be alleged and shown that the commerce for which plaintiff would utilize the stream is lawful.—*Spokane Mill Co. v. Post*, 50 Fed. Rep. 429.

POSSESSION OF LAND, DAMAGES: The lawful possession of land is all that is required to enable the plaintiff to recover damages, after building a dam across a water course running through such land, by reason whereof the water is thrown back upon the land of the plaintiff.—*Morris v. Glenn*, 1 Idaho, 590.

NUISANCE, RIGHT TO STOP CONFLAGRATION: A person who tears down or destroys the house of another

in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, is not personally liable in an action by the owner of the property destroyed.—*Surocco v. Geary*, 3 Cal. 69, 58 Am. Dec. 385; see also note 19 L. R. A. 196-198.

NUISANCE, SEEPAGE FROM LEVEE: Water which seeps through a large and high levee protecting all the lands adjoining a river from overflow, and which gradually seeks a lower level, not in a defined channel, but as surface water is wont to do, by percolation and by the force of gravity, should be permitted to pass off by natural flow, like other surface water coming without volition from the clouds or rising to the surface from springs, and the owner of higher land has an easement for such natural flow over the adjoining lower land; and where the owner of lower land erects an embankment upon his land which keeps back both the ordinary surface water which would flow naturally over it, and the seepage from the levee, which would otherwise pass off without detriment to any one, and thereby causes the water to flood the higher land above, the owner of such higher land is entitled to maintain an action to remove and abate such embankment as a nuisance.—*Gray v. McWilliams*, 98 Cal. 157, 32 Pac. 976, 35 Am. St. Rep. 163. But see application of rule in *Los Angeles, Etc. Ass'n*

v. Los Angeles, 103 Cal. 467; 37 Pac. 375; Rudel v. Los Angeles, 118 Cal. 288; 50 Pac. 400; Cass v. Dicks, 14 Wash. 80, 53 Am. St. Rep. 863, 44 Pac. 113.

TREES PLANTED NEAR BOUNDARY LINE: A row of trees planted near a boundary line is not a nuisance as to the adjoining proprietor merely because it renders his land unfit for a purpose for which he has never attempted or wished to use it. The projection of the trunks of the trees a few inches on the land of the adjoining proprietor, but not enough to prevent him from plowing and cultivating his land as near the line as he could if the trees had not been there, does not render them a nuisance. The trees and overhanging branches, in so far as they were on or over the land of the adjoining proprietor, belonged to him, and he could have cut them off or trimmed them at his pleasure.—*Grandona v. Olson*, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121; see note 52 Am. St. Rep. 301.

NUISANCE, COMMON LAW REMEDY: The statute, defining what are nuisances and prescribing a remedy by action, does not take away any common law remedy in the abatement of nuisances which the statute does not embrace.—*Stiles v. Davis*, 5 Cal. 120, 63, Am. Dec. 110.

NUISANCE, ACTION TO ABATE, INJUNCTION: An action for the abatement of a nuisance is a suit in equity, and an injunction against its continuance may be issued therein, although it is not specifically prayed for in the complaint. In such an action, the verdict of the jury is merely advisory to the court, and an erroneous instruction to them is immaterial.—*Sullivan v. Royer*, 72 Cal. 248, 13 Pac.

655, 1 Am. St. Rep. 51; *Richardson v. Eureka*, 110 Cal. 446, 42 Pac. 965.

As to injunctions by municipal corporations against nuisances affecting public morals, peace, and good order, and health and safety: See note 41 L. R. A. 321-330.

Injunction against a nuisance maintained by a municipal corporation: See note 23 L. R. A. 301-303.

Injunction against nuisances generally: Note, Sec. 3284.

POLLUTION OF STREAM, FINDINGS: In an action to enjoin the pollution of a river, where the complaint avers that the defendant maintained on the banks of the river a sawmill and also a cook house, outhouses, barn, and stables, and other fixtures, which usually accompany a sawmill, and that it caused and permitted sewage, offal, waste, and fetid matter from the sawmill, cook house and stables, to be drained and deposited in the stream, and the findings show that it had allowed a large manure pile to accumulate from the stables upon the banks of the stream, which polluted its waters, and that it also maintained near the stream a corral, or hog-pen, from which the waters were further polluted, and that as matter of law the hog-pen and manure pile constitute nuisances, which the defendant by the decree was enjoined from maintaining, the findings are sufficiently within the issues, and the fact that the court did not suppress the stable, rather than the use of it, rendering it a nuisance, is not an error of which the defendant can complain.—*People v. Elk River M. & L. Co.* 107 Cal. 214, 40 Pac. 486, 48 Am. St. Rep. 121.

Section 3374. Waste, Actions for: If a guardian, tenant for life or years, joint tenant or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

1887 R. S. Sec. 4530.

Section 3375. Trespass for Cutting Trees, etc., Actions for: Any person who cuts down or carries off any wood or underwood, tree, or timber, or girdles, or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of or in any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction.

1887 R. S. Sec. 4531.

Statutes giving punitive, double, or treble damages against one cutting or otherwise converting to his own use timber growing on the land of another without his consent are confined to cases where some element of recklessness, wantonness, willfulness, or evil design enters into the act. Therefore, if the land is located in a wilderness, far from human habitation, and there

is nothing to indicate that anyone actually asserted ownership of any part of the country thereabout, and there is nothing to indicate willfulness, wantonness, or recklessness, actual damages only will be allowed.—*McDonald v. Montana Wood Co.* 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616; see also *Stewart v. Sefton*, 108 Cal. 197, 41 Pac. 293.

Section 3376. Exceptions in Certain Cases under the Last Section: Nothing in the last Section authorizes the recovery of more than the just value of the timber taken from uncultivated woodland for the repair of a public highway or bridge upon the land, or adjoining it.

1887 R. S. Sec. 4532.

Section 3377. Damages for Forcible Entry, etc., may be Trebled: If a person recover damages for a forcible or unlawful entry in or upon, or detention of any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

1887 R. S. Sec. 4533.

Verdict and judgment in forcible entry and detainer: Sec. 3990.

Section 3378. Actions for Injury by Persons Unlawfully Brought into the State: Any person, officer, company, association or corporation who shall knowingly bring, or cause to be brought, or aid in bringing, into this State any armed or unarmed police force, detective agency or force, or armed or unarmed body of men for the suppression of domestic violence shall be liable in a civil action to any person for any injury to person or property through the action or as the result of the coming or bringing into the State of such body of men, or any of them, whether acting together or separately in carrying out the purpose for which they were brought or came into the State.

1899, 5th Ses. p. 9.

CHAPTER CXLI.

ACTIONS CONCERNING REAL PROPERTY.

Section.

ACTION TO QUIET TITLE. . .

3379. Parties to an action to quiet title.
3380. When plaintiff can not recover costs.

GENERAL PROVISIONS.

3381. Proceedings where plaintiff's title terminates pending suit.
3382. When value of improvements can be set off.
3383. Order of survey and inspection of premises in dispute.

Section.

3384. Service. Liability for unnecessary injury.
3385. Injunction during foreclosure, after sale on execution.
3386. Damages for injury to the possession after sale.
3387. Alienation pending suit. Action not prejudiced.
3388. Mining claims, actions concerning local rules.

Section 3379. Parties to an Action to Quiet Title: An action may be brought by any person against another who claims

an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

1887 R. S. Sec. 4538.

Executors and administrators may bring suit to quiet title: Sec. 4211.

Who may be joined as defendants: Sec. 3167 and 3168.

Action by joint tenants, tenants in common, coparceners, joinder parties plaintiff, to determine adverse claim, establish common source of title, declare trust, or remove cloud: Sec. 3163

Parties interested in property may be brought in by order of the court by proper amendment: Sec. 3178.

No entry upon real property deemed valid unless an action be commenced within one year after entry and within five years after right to make it descended or accrued: Sec. 3119.

Adverse possession can not be established without payment of taxes: Sec. 3124.

Real property must be described with such certainty as to enable the officer upon execution to identify it: Sec. 3226.

Place of trial, actions affecting realty: Sec. 3179.

Affirmative injunctions granted in, for restitution after eviction by violence, fraud or stealth: Sec. 3284.

Re-entry on conviction for contempt, court issues process to restore party entitled to possession: Sec. 3820.

Supersedas, on appeal, in actions concerning real property: Sec. 3579.

Quieting title, water rights, party not included in general decree: Secs. 3791 to 3794.

Action may also be maintained to determine interests in personal property or rights in money obligation: Sec. 3743.

ACTION TO QUIET TITLE: Under Section 4538, Rev. St. 1887, an action to quiet title may be brought by any person against another who claims an estate or interest in real estate adverse to him, for the purpose of determining such adverse claim.—Fry v. Summers, (Idaho), 39 Pac. 1118.

Held, the complaint states a cause of action under said section.

ENJOINING SALE ON EXECUTION: Defendants recovered judgment against certain parties, including husband of plaintiff. Execution was issued upon such judgment, and levied upon certain mining property of plaintiff, as "community property" of plaintiff and her husband, and the same was advertised to be sold under such execution. Plaintiff brought her action under Section 4538 of the Revised Statutes of Idaho, to enjoin the sale, and for the vacation of the writ of execution, as to such property, Held, that such action was

properly brought.—Young v. First Nat. Bank of Hailey (Idaho), 39 Pac. 557.

Invalid execution sale.—See Ollis v. Kirkpatrick, 2 Idaho 976, 28 Pac. 435.

ADVERSING APPLICATION FOR PATENT: Under Rev. St. 1887, Section 4217, providing that every material allegation of the complaint not controverted by the answer must be taken as true, an allegation in a complaint in an action to decide an adverse claim, filed against the application for a patent to a mining location, that plaintiff filed in the land office their adverse claim to the property in dispute, need not be proved when not denied by the answer. Burke v. McDonald (Idaho), 33 Pacific 49.

SAME, FINDINGS, VERDICT: In such action a verdict simply finding that plaintiffs are entitled to the right of possession, and which does not allege that they have such right by reason of a compliance with the absolute requirements of the law, or that they have it as against the government, as well as against defendants, is bad, and will operate to reverse a judgment based thereon. Act congress, March 2, 1881, providing that, if no title to the ground in controversy be established by either party, the jury shall so find.—Burke v. McDonald (Idaho), 33 Pacific, 49.

EQUITY JURISDICTION, CONVEYANCE OF MINING CLAIM, MISTAKE AND INADVERTENCE: Under the pleadings the court had jurisdiction to hear and determine the question as to whether a mistake had been made and whether the conveyance was a cloud upon plaintiff's title, and in case the mine was sold before the adjudication of said matters, and the proceeds of the sale of the interest in dispute deposited in the court, the court had jurisdiction under the pleadings to determine the rights of plaintiff thereto.—Pence v. Sweeny, 2 Idaho, 914, 28 Pac. 413.

Note: **ACTIONS CONCERNING REAL PROPERTY GENERALLY:** The following citations to decisions of supreme court of Idaho in actions concerning real property arising principally in actions of ejectment are inserted here not for the purpose of illustrating or construing the foregoing section, but for convenience in grouping cases concerning real property.

EJECTMENT, PROOF REQUIRED: A party bringing an action for ejectment is required to establish, in order to recover, right to possession and possession in plaintiff, and ouster by de-

fendant.—*McMasters et al v. Torsen* (Idaho), 51 Pac. 100.

DIFFERENT PROOF REQUIRED THAN ACTION TO QUIET TITLE: A proof of a state of facts might entitle a party to recover under the statutory action of *quia timet* can not be made available in an action of ejectment.—*McMasters v. Torsen* (Idaho), 51 Pac. 100.

EJECTMENT, ANSWER, SPECIFIC PERFORMANCE: An averment in an answer seeking affirmative relief by specific performance in ejectment, alleging a contract entirely unilateral, without time, terms or considerations or conditions, is bad on demurrer.—*Stockton v. Herron* (Idaho), 32 Pac. 257.

SAME, PLEADING: To entitle a defendant in action of ejectment to relief by way of specific performance, his answer or cross-complaint must show such a contract or agreement as would sustain a bill in equity for specific performance.—*Stockton v. Herron* (Idaho), 32 Pac. 257.

AGREEMENT TO RECONVEY: Deed with agreement to reconvey, held a mortgage, and that in such a case ejectment will not lie by grantee to obtain possession of land from grantor. The remedy is foreclosure under Section 4520, Rev. St. Idaho.—*Kelley v. Leachman*, 2 Idaho, 1112, 29 Pac. 849.

EQUITABLE DEFENSE, GOOD FAITH REQUIRED: The testimony in this case considered, and held insufficient to sustain the defense set up in the answer.—*Andola v. Picot* (Idaho), 46 Pac. 928.

NATIONAL JURISDICTION, MINING CLAIMS: A suit brought in support of an adverse claim, in pursuance with the requirements of Section 2326, Rev. St. U. S. as amended March, 1881, (1 Sup. Rev. St. 609), is for that reason a suit arising under the laws of the United States, within the meaning of the statute giving jurisdiction on that ground, irrespective of the character of the question involved in the litigation.

Such an action has for one of its objects the determination as to whether either party has divested the United States of the possessory title to the premises in controversy. It is not only intended to determine the rights of the two parties as between themselves, but also as between each of the parties and the United States; thereby making the United States substantially, though informally, a party to the suit, and entitled to have their rights determined in the national courts. On that ground the United States are entitled to have their rights determined in the national courts. Such cases are not within the

decision of *Trafton v. Nougues*, 4 Sawy. 178, and *Water Co. v. Keyes*, 96 U. S. 199; *Burke v. Bunker Hill & S. Mining & Concentrating Co.* 46 Fed. Rep. 644.

JURISDICTION, MINING CASES, CONSTRUCTION OF UNITED STATES LAWS: The question of the discovery of a mining claim within the limits of another valid mining claim involves the construction of a congressional act, but, having already been construed by the supreme court of the United States can not be reconsidered by the inferior national courts.

SAME, ABANDONMENT OF CLAIM: Abandonment of a mining claim is not dependent upon any law of congress. In determining any question of abandonment, the construction of no act of congress is involved, and its consideration does not give the United States courts jurisdiction. (In equity.)—*Inez Min. Co. v. Kinney* (Idaho), 46 Fed. Rep. 832.

ADVERSE CLAIM TO MINING LAND, JURISDICTION, FEDERAL QUESTION: A suit brought in pursuance of Rev. St. Sec. 2326, based upon an adverse claim made upon the filing of an application for a patent for mining ground, is a suit arising under the laws of the United States, and is within the jurisdiction of the circuit court.—75 Fed. 37, affirmed.

SAME, EQUITABLE OR LEGAL ACTIONS: Suits brought in pursuance of Rev. St. Sec. 2326, to determine adverse claims to mining ground, are in their nature equitable, and not legal actions.—75 Fed. 37, affirmed. (Appeal from Circuit Ct. U. S. for Dist. Idaho.)—*Shoshone Min. Co. v. Rutter* (C. C. A.), 87 Fed. Rep. 801, 31 C. C. A. 223.

MINES AND MINING, VEINS CROSSING SIDE LINES, RES JUDICATA, ACTION TO DETERMINE ADVERSE CLAIMS, DEFAULT JUDGMENT, WITHDRAWAL OF ANSWER: Where the course of a vein or lode is across the claim, instead of in the direction of its length, the side lines of the location become its end lines, and the end lines the side lines.

Where an action was brought pursuant to Rev. St. Secs. 2325, 2326, to determine an adverse claim to a triangular piece of mining ground embraced within the overlapping limits of interfering locations, held, that the matter in controversy was the aforesaid piece of ground, and that in a subsequent suit between the same parties to determine the right to an ore body lying outside the triangle, the judgment was conclusive only as to such matters as were actually decided, and not as to such matters as might have been decided.

In determining what was in fact decided, findings of fact filed by the court

are not to be ignored, even though the state statutes do not provide for such findings. On the contrary, the findings, if not conclusive as against all testimony, are at least to be regarded as very persuasive evidence of what the court did decide.

A judgment by default, or a judgment entered after defendants have withdrawn their answer upon testimony introduced by plaintiff alone is just as conclusive between the parties upon all matters necessary to support the judgment as one rendered after answer and contest.

In an action brought pursuant to Rev. St. Secs. 2325, 2326, to determine an adverse claim to certain mining land embraced within the lines of two overlapping claims, the defendant withdrew its answer, and afterwards in its absence, judgment was rendered against it upon evidence introduced by the plaintiff. In the meantime, and pending the further proceedings, defendant amended its application in the land office so as to leave out of its claim the land in dispute. Held that by so withdrawing its answer and amending its application, defendant did not take itself out of the court, so as to prevent the judgment from becoming conclusive against it upon all matters, actually decided.

It may well be doubted whether, after institution of a suit to determine an adverse claim, the filing in the land office of an amendment to the claim, whereby, the disputed land is left out, and a patent asked only for the remainder, can have any force or effect whatever until judgment is rendered in the adverse suit; for Rev. St. Sec. 2326, declares that after the filing of the adverse claim "all proceedings, except the publication of notice, and making and filing affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived."

Nor can the withdrawal of the answer, and the amendment of the application in the land office so as to leave out the land in dispute, be construed as a waiver of the adverse claim, within the meaning of this section; for a waiver of such claim can only be made by the party filing it, and not by the party against whom it is made.

Where, in a suit to determine an adverse claim as to a piece of mining ground lying within the limits of interfering locations, the plaintiff so frames his complaint as to base his right solely upon alleged priority of location, a judgment in his favor, though entered by default, is necessarily a decision of the question of priority, not only as to the piece of ground in controversy, but

as to the whole of both locations.—(9 C. C. A. 613, 31 Fed. 557, reversed.)

QUAERE: Whether, in the case in which a vein or lode passes through one end line and one side line of a mining location, the owner of the claim has any right to follow the dip beyond the vertical plane of his side lines within the limits of some equitably created new end lines, or is limited to the common law rights of an owner of real estate, and nothing more; and whether, in case the location is amended so as to cut off one end of the claim, and thus make the vein pass through both lines, assuming that such amended location is valid, the rights acquired under it are to be regarded as relating back to the date of the original location, so as to give a right to follow the dip underneath an intermediate location, or as arising simply at the time of amendment, in which case the immediate location shall have the prior right. (Certiorari to Circuit Ct. Appeals, 9th Circuit Ct. Dist. Idaho.)—*Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683 (15 Sup. Ct. Rep. 733).

PUBLIC LANDS, DONATION ACT, PROOF OF TITLE: The donation act of September 27, 1850, granting lands to settlers in the Oregon territory, required that the settler, within a certain time after survey should be made, or, if already made, within the same time after settlement, file a notice of the land claimed and certain proof of settlement with the surveyor general, who should then issue a certificate showing the lands to which the settler was entitled. In 1853 an act was passed requiring persons entitled to the benefit of the donation act to file, in advance of the making of public surveys, a notice setting forth their claims to the benefit of the donation act, with proof of settlement. Held, that one who had settled on unsurveyed land, and who, within the time limited by the act of 1853, filed his notice and proofs under that act, and was only prevented from complying with the terms of the donation act by the failure of the government to extend its survey over the lands claimed by him, was entitled, though he had never received a patent, to be quieted and protected in his possession of the land, and could convey the same right to his grantee. (Appeal from Circuit Ct. U. S. for Dist. Idaho.)—*Robinson v. Caldwell* (Idaho), 67 Fed. Rep. 391.

EJECTMENT, TITLE, HALF-BREED SCRIP, LOCATION: Plaintiff in ejectment claimed as the grantee of land upon which a half-breed Sioux under Act. Cong. July 17, 1854, which Indian had located scrip issued to him scrip was not transferrable, but was

issued to designated individuals in exchange for the interest acquired by them, collectively under a former treaty, Held, that the scrip, and the location of it, did not vest the legal title in the plaintiff's grantor, and it was proper to instruct the jury that they should disregard the location and the deed to plaintiff as evidence of title, and only regard them as evidence explaining his entry, possession, and good faith.

SAME, INSTRUCTIONS, POSSESSION OF ENTIRE TRACT: The court instructed the jury that if the half block sued for was held by plaintiff in one tract, and was so marked out that defendant could know its location, and plaintiff had possession of any part of it, such possession extended to the entire tract, but that if it was cut up into separate and distinct lots, and so marked on the ground, then he must show possession of all thereof. Held, that after this it was not error to refuse plaintiff's request to instruct that if the jury found that he had built two houses on the half block in question, and that he occupied one of them by his tenant, then he was in possession of the whole of such tract, and was entitled to recover. (In error to Circuit Ct. U. S. for Dist. Idaho.)—*Carter v. Ruddy*, 56 Fed. Rep. 542.

COUNTIES, DISPUTED BOUNDARIES: One county can not maintain an action in equity against another county for the purpose of settling boundary lines.—*Humboldt County v. Lander County*, 22 Nev. 248, 38 Pac. 578, 58 Am. St. Rep. 750.

MUNICIPAL CORPORATION, PUBLIC SQUARES: An action to quiet title is a proper proceeding against a municipal corporation to determine its claim that it holds the legal title to land in trust for the people of the state, and that the same has been dedicated to the use of the public.—*People v. Holliday*, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186 and note.

ACTION TO QUIET TITLE: Percolating water, collected and running in a defined channel, is property, the use of which is acquired by grant or appropriation.—*Cross v. Kitts*, 69 Cal. 217, 10 Pac. 409, 58 Am. Rep. 558.

Grantee of purchaser of land at foreclosure sale may maintain suit against a grantee of the mortgagor, who had not been made a party to the suit for foreclosure, to quiet title to the land, relying upon twelve years' adverse possession, taken and held under the sheriff's deed. Such suit can not be regarded as a suit for the foreclosure of a mortgage.—*Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722. Party in possession whose right is perfected by ad-

verse possession during the period prescribed by the statute of limitations is entitled to bring his action to determine an adverse claim, or to remove a cloud which would thenceforth diminish the value of his property.—Id.

One who comes into equity for relief against cloud cast by foreclosure proceedings upon his interest, which escaped being bound by the decree in foreclosure through a slip in the proceedings, will be required as a condition for relief to pay his proportion of the mortgage debt, less the amount of the rents and profits of his interest received by the mortgagee, who purchased at the foreclosure sale and went into possession thereunder.—*Johnson v. San Francisco Savings Union*, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129.

QUIETING TITLE AGAINST MORTGAGE: The owner of the legal title to land may maintain an action to quiet title against the claimant of an invalid mortgage lien. The plaintiff has a right to be quieted in his title when any adverse claim is made, the effect of which might be litigation, or loss or depreciation of the value of his property.—*Withers v. Jacks*, 79 Cal. 297, 21 Pac. 824, 12 Am. St. Rep. 143.

TAX SALE OF FRANCHISE: The sale of a wharf for taxes does not cast a cloud on plaintiff's title, nor work irreparable injury, where the plaintiff does not pretend to own title in the soil, but only to an interest in the franchise.—*De Witt v. Hays*, 2 Cal. 463, 56 Am. Dec. 352.

INVALID LIEN, CLOUD ON TITLE: An action may be maintained by the owner of property subject to an invalid street assessment to have it adjudged invalid, where there is nothing upon the face of the assessment to show that the lien is not valid, and where, by reason of matters outside of the assessment as it is recorded, the apparent lien may be shown not to be a valid encumbrance; in such cases the assessment constitutes a cloud upon the title which the property owner is entitled to have removed by a court of equity, although the same matters may be asserted as a defense to an action for the enforcement of the assessment.—*Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33.

Injunction will be granted to restrain trespasser from removing gold-bearing quartz from a gold mining claim, for the removal of the gold is emphatically the taking away of the entire substance of the state, and besides, there is, in such a case, no mode of estimating the injury that will even approach to substantial accuracy. The owner of a mining claim has in practicable effect a good vested title to the property, and

is to be treated as having such title until it is divested by the exercise of the higher right of the superior proprietor. Such title is sufficient to maintain this action.—*Merced Mining Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262; *Kellog v. King*, 114 Cal. 386.

Possession of mining claim taken without reference to mining rules is sufficient to maintain an action, as against one entering by no better title. This possession need not be evidenced by actual inclosures. If the ground is included in the district, visible, and notorious boundaries, and the party in possession is working a portion of the ground within those boundaries, this is enough, as against one entering without title.—*English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574.

PRE-EMPTION RIGHT TO PUBLIC LAND: In an action to recover possession of public land, where the plaintiff claims to recover by reason of prior possession, and the defendant claims as a pre-emptioner under the laws of the United States, he is entitled to prove the necessary facts to establish his pre-emption right.—*Tyler v. Green*, 28 Cal. 406, 87 Am. Dec. 130; see also *Schieffery v. Tapia*, 68 Cal. 186, 8 Pac. 878.

DECREE QUASI IN REM: Although a decree quieting title is not in rem, strictly speaking, it fixes and settles the title to real estate, and to that extent partakes of a judgment in rem. A state has power to regulate the tenure of immovable property within its limits, the conditions of its ownership, and the modes of establishing the same, whether the owner be a citizen or stranger, and may provide for quieting title to land within its limits by constructive service of summons.—*Perkins v. Wakeham*, 86 Cal. 580, 25 Pac. 51, 21 Am. St. Rep. 67.

EQUITABLE TITLE, CROSS-COMPLAINT: A cross-complaint is proper in an action to quiet title, when it seeks to enforce an equitable title against the plaintiff as the holder of the legal title.—*Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243.

QUIETING TITLE, EJECTMENT, JURY TRIAL: In an action to determine an adverse claim to real estate under this section, where the pleadings show that the plaintiff is in possession, and the answer sets up as a defense a cause of action in ejectment, averring that defendant was rightfully in possession and was ousted by the plaintiff before the commencement of the action, and that the plaintiff wrongfully withholds the possession from the defendant, the defendant is entitled to a jury trial upon those issues.—*Donahue v.*

Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283.

In an action brought by a party out of possession, against one claiming title and in possession, and asking for a restitution of the premises, either party is entitled to a jury trial as a matter of right.—*Gillespie v. Gouly*, 120 Cal. 515, 52 Pac. 816.

EJECTMENT AGAINST VENDEE Ejectment will lie against a vendee in possession of land under a contract of purchase, who, after part performance, refuses to further comply with the terms and conditions of the contract, or surrender the possession.—*Hicks v. Lovell*, 64 Cal. 14, 27 Pac. 942, 49 Am. St. Rep. 679.

EJECTMENT, POSSESSION OF PUBLIC STREET: The municipal authorities as trustees of the public are in possession of the public streets and ejectment will not lie for the recovery by an abutting owner of the possession of any part of the street from a railway company having a right of possession under the municipal authorities.—*Montgomery v. Railway Co.* 104 Cal. 186, 37 Pac. 786, 43 Am. St. Rep. 89. See also note 18 L. R. A. 787.

A municipal corporation may maintain ejectment to recover possession of a street that has been dedicated to a public use even against the owner in fee thereof.—*San Francisco v. Grote*, 120 Cal. 59, 52 Pac. 127, 65 Am. St. Rep. 155.

During the pendency of the action of ejectment, the defendant can acquire no new rights by prescription as against the plaintiff by the mere fact that he remains in possession.—*Breon v. Robrecht*, 118 Cal. 469, 50 Pac. 689 and 51 Pac. 33, 62 Am. St. Rep. 247.

Ejectment, what title or interest will support: See note 18 L. R. A. 781-791.

EJECTMENT, NOTICE TO QUIT: A person who conveys property by warranty deed, and remains in possession, is not entitled to notice to quit or demand of possession from his grantee or those claiming under him before the commencement of an action to eject him.—*Dodge v. Walley*, 22 Cal. 225, 83 Am. Dec. 61.

Notice to quit is not necessary where the relation of landlord and tenant does not exist.—*Kilburn v. Ritchie*, 2 Cal. 145, 56 Am. Dec. 326; *Joy v. McKay*, 70 Cal. 446, 11 Pac. 763.

EJECTMENT: A tenant in common of an undivided portion of a tract of land is entitled to the possession of the whole tract as against all persons except his co-tenants, and as a consequence may against all others than them maintain ejectment for the entire premises.—*Touchard v. Crow*. 20

Cal. 150, 81 Am. Dec. 108; *Hardy v. Johnson*, 1 Wall. 373.

PARTIES: The action of ejectment must be brought against the actual occupant of the premises, if there be one. If such occupant be the tenant of another, the landlord may appear and defend in his name or be substituted in his place.—*Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765 and note.

EJECTMENT, ANSWER: In an action of ejectment to recover the possession of land, where the defendant simply denied the allegations of the complaint. Held, that he could not introduce in evidence a copy of the record of a former recovery. In such action, where the plaintiff claimed by virtue of his prior possession, the defendant will not be allowed to show that a third party had an older and better claim to the land than the plaintiffs.—*Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692.

In an action of ejectment, an answer by a defendant affirmatively setting up title in himself in detail is to be construed as a general denial of the plaintiff's title, and not as a cross-complaint requiring an answer by the plaintiff.—*Phillips v. Hagart*, 113 Cal. 552, 45 Pac. 843, 5 Am. St. Rep. 369.

ESTOPPEL: The bare possession by the tenant of the demised land at the time the lease is given is sufficient to take the case out of the operation of the general rule, that the tenant cannot, before surrendering possession, dispute the landlord's title. As between landlord and tenant the estoppel is designed as a shield for the protection of the former, but not as a sword for the destruction of the latter.—*Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129 and note.

EQUITABLE DEFENSE: A perfect equity united with possession is, under our system, equivalent, for all purposes of defense to a legal title.—*Morrison v. Wilson*, 13 Cal. 494, 73 Am. Dec. 593; *Love v. Watkins*, 40 Cal. 566.

OUTSTANDING TITLE, WHEN NOT ISSUABLE: In an action of ejectment, brought solely on the actual prior possession of the plaintiff, the defendant being a mere trespasser, the latter cannot justify his act by showing the true title to be outstanding in a third person. But when the plaintiff in ejectment does not rely on prior possession, but on strict title, the defendant in possession, having a good prima facie right, may set up and show the true title to be in another party, for he thereby proves that the plaintiff has no title with which to overcome that which the law presumes to exist in the defendant by virtue of his actual possession. Prior possession is evidence of title; but this evidence may be destroyed by abandon-

ment.—*Bird v. Lisbros*, 9 Cal. 1, 70 Am. Dec. 617.

The defendant, when a mere naked trespasser, cannot introduce evidence to show that the title is in a third party, or that the fee of the land in question is in the government of the United States; nor to impeach the validity of the conveyance to plaintiff collaterally as against third parties. The plaintiff in ejectment may sue one or more defendants, and they may answer separately, or demand separate verdicts, unless they do so, however they will be concluded by the general verdict.—*Winons v. Christy*, 4 Cal. 70, 60 Am. Dec. 597.

Mere naked trespasser cannot show outstanding title in ejectment as against one claiming by virtue of prior possession; but such trespasser can show that the plaintiff, or those from whom he derives his title, has parted with his right of possession by conveyance, or lost it by abandonment.—*Mallett v. Gold & Silver Mining Co.* 1 Nev. 188, 90 Am. Dec. 484.

POSSESSION: Proof of prior possession is sufficient to maintain ejectment as against a mere naked trespasser. Allegation that plaintiff was in possession at time of ouster complained of is sufficient allegation of title to sustain the declaration.—*Hutchinson v. Perley*, 4 Cal. 33, 60 Am. Dec. 578; *Burt v. Panjaud*, 99 U. S. 182.

Possession coupled with color of title must prevail in ejectment, except where a better title is shown in defendants. Plaintiff in ejectment is not compelled to prove fee-simple title, although he may have alleged it in his declaration. He may rely on prior possession, if he choose to do so.—*Winans v. Christy*, 4 Cal. 70, 60 Am. Dec. 597. See also *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599 and note; *Perquette v. Caulfield*, 4 Cal. 278, 60 Am. Dec. 615.

PUBLIC MINERAL LANDS, MINERAL, PRESUMPTION OF RIGHT BY OCCUPATION: The right to be protected in the possession of public lands is founded alone on the doctrine of presumption; for a license to occupy, from the owner, will be presumed. The government of the United States, in the face of the notorious occupation of the public lands by her citizens; that upon those lands they have mined for gold, constructed canals, built saw mills, cultivated farms, and practiced every mode of industry, has asserted no right of ownership to any of the mineral lands.

In constructing canals, under the license of the state, the survey of the ground, planting stakes along the line, giving public notice, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and

forms a series of acts of ownership which must be conclusive of the right.—*Conger v. Weaver*, 6 Cal. 548, 65 Am. Dec. 528. See also *Hill v. King*, 8 Cal. 383.

POSSESSION OF MINING CLAIMS REGULATED BY LOCAL RULES: Mining claims are held by possession but that possession is regulated and defined by usage and local and conventional rules; and the "actual possession" which is applied to agricultural land, and which is understood to be a *possessio pedis*, cannot be required in case of a mining claim, in order to give a right of action for the invasion of it. A mining claim must be in some way defined as to limits, before the possession of or working upon part gives possession to any more than the part so possessed or worked. But when the claim is defined, and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the entire claim.

POSSESSION OF PART OF MINING CLAIM IS SUFFICIENT: So, if a party enters upon a mining claim bona fide, under color of title, as under a deed or lease, the possession of part as against any one but the true owner or prior occupant is the possession of the entire claim described by the paper; and this, though the paper does not convey title. A third person could not invade the possession of the party taking it under such circumstances, and set up, as against him, outstanding title in a stranger with which he had no connection.

PRINCIPLE OF CONSTRUCTIVE POSSESSION APPLIES: The condition of the possessor in such instances is no worse than that of the occupant of other real estate, in which case the principle above stated applies. But this principle does not touch the case of an entry into possession in pursuance of mining rules and regulations, as for a forfeiture, abandonment, etc., but applies where possession is taken independently of such rules.—*Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567. But while a party who is in the prior possession of a piece of mining ground is entitled to the possession as against a mere intruder, he is not as against one who has subsequently located the same in compliance with the mining laws.—*Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93.

ENTRY ON A PORTION OF A TRACT OF LAND UNDER A DEED DESCRIBING ALL: One who enters into actual possession of a portion of a tract of land, claiming the whole, under a deed in which the entire tract is described by metes and bounds, is not limited in his possession to his actual inclosure, but acquires possession to

the entire tract, if it was not in the adverse possession of any other person at the time of the entry.—*Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103 and note. But where an entry is made on a part of a tract of land, under a deed which the grantee knows does not convey the whole, constructive possession does not extend to the entire tract. If the deed contains no definite and certain boundaries which can be located, marked out, and made known, it cannot have the effect to extend the possession beyond the *possessio pedis*, which is definite, positive and notorious.—*Cannon v. Union Lumber Co.* 38 Cal. 676; *Wolfskill v. Malajowich*, 39 Cal. 280; *Hess v. Winder*, 30 Cal. 359.

INVALIDITY OF DEED: Under a general denial in an action of ejectment, in which the plaintiff claims title under a deed from the defendant, evidence is admissible to show that the consideration of the deed under which the plaintiff bases his right of entry was illegal, and that the deed was therefore void.—*Sparrow v. Rhoades*, 76 Cal. 208, 18 Pac. 245, 9 Am. St. Rep. 197.

PLEA IN ABATEMENT, ANOTHER ACTION PENDING: In an action of ejectment, where, in addition to the defense of abatement by reason of the pendency of a former action, the defendant relies upon other defenses, which go directly to the merits of the cause, it is the better practice for the trial court to require the defendant to present his evidence upon the plea in abatement at the opening of his defense.

EQUITABLE ESTOPPEL: The fact that shortly after the entry of the defendant upon the land he placed valuable improvements thereon, with the knowledge of the plaintiff and his grantors, and without any objection from them, and that at the time the plaintiff and his grantors knew their title, and that it was the same at the commencement of the action, is not sufficient to constitute an equitable estoppel as against the plaintiff.—*Leonard v. Flynn*, 89 Cal. 535, 26 Pac. 1197, 23 Am. St. Rep. 500.

STIPULATION: If, in ejectment, where five years adverse possession is pleaded, the parties stipulate that the plaintiff was never in possession, but the stipulation admits title to have been in the plaintiff, the stipulation will be construed as referring to actual possession.—*San Francisco v. Fulde*, 37 Cal. 349, 99 Am. Dec. 278.

Value of improvements cannot be set off against damages in ejectment, where no foundation is laid in the allegations of the answer for any proof on

the subject.—*Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738.

EJECTMENT: Strict proof of execution sale should not be required against trespasser after the lapse of several years when one enters upon a portion of a tract of land, claiming the same under a deed executed upon such execution, no other party being in the adverse possession of any part of it, as his possession extends to the bounds of his deed.—*Russell v. Harris*, 38 Cal. 426, 99 Am. Dec. 421.

PATENT AS EVIDENCE OF TITLE: A patent is not conclusive, as evidence of title, as against a grant made by congress prior to the patent.—*Megerle v. Ashe*, 27 Cal. 322, 87 Am. Dec. 76.

Bona fide pre-emptioner of public land under the laws of the United States may attack collaterally a patent for the same land granted by the state by virtue of a selection of the land made by the state while the pre-emptioner was in possession, in an action of ejectment against him by the state patentee, for the state had no title to the land.—*Terry v. Megerle*, 24 Cal. 609, 85 Am. Dec. 84.

Facts of ouster of, or intent to oust, co-tenant must be found by jury, for the law will not presume from acts of ownership by one tenant in common, nor from his refusal to allow a co-tenant to enter, nor from both combined, that there was intent to oust.—*Carpentier v. Mendenthal*, 28 Cal. 484, 87 Am. Dec. 135.

RECITALS IN DEED AS EVIDENCE: If a deed executed by one of the parties to an action, and to which the other party is an entire stranger, is used as evidence in that action, its recitals can only be used as simple admissions made by the party by whom it was executed. In a trial in an action of ejectment upon a question of boundary, the testimony of five unimpeached witnesses stood opposed to the description contained in a deed to which one of the parties was a stranger, the court found from the fact as recited in the deed. Held, that the finding was so far opposed to the evidence as to justify awarding a new trial.—*Franklin v. Dorland*, 28 Cal. 175, 87 Am. Dec. 111.

Where pending an action in ejectment against several defendants holding distinct parcels of property plaintiff sells to one of such defendants, the latter may continue the suit as plaintiff against the other defendants. But it must be the same suit, and for the property claimed by the first plaintiff, and not for that and other property claimed by the last plaintiff, and united by an amended complaint to that originally sued for. Where judgment is re-

covered for part of an undivided parcel of real property, plaintiff cannot expel the defendants from the possession of the whole tract if they have quietly submitted to a common or joint occupancy by the plaintiff with themselves.—*Bullion M. Co. v. Croesus Gold, etc. M. Co.* 2 Nev. 168, 90 Am. Dec. 526.

JUDGMENT, GROWING CROPS: The owner of lands, who has recovered a judgment of ejectment against persons occupying under a claim of title, is not entitled to the crops grown and harvested by such persons before the judgment.—*Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462.

RES JUDICATA: Lease which has been treated as valid by the court and all the parties as creating a term of years, on two former appeals, may be introduced at a third trial to show that it creates but a tenancy at will, and held invalid as a lease for years, on account of a defective acknowledgment.—*McLeran v. Benton*, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814.

JUDGMENT IN EJECTMENT CONCLUSIVE: In an action to recover real estate no particular form of complaint is necessary; but it is only required that it should be adapted to the estate sought to be recovered, and the facts desired to be put in the issue. Judgment in such action is conclusive and final as to the parties and privies in such action upon all facts put in issue and determined therein, and concludes them in any subsequent action in which such facts arise, but does not preclude either party from showing that their rights have been varied or extinguished at a subsequent period.—*Caperton v. Schmidt*, 26 Cal. 479, 85 Am. Dec. 187.

Judgment in ejectment does not preclude plaintiff from maintaining a subsequent action to recover damages for withholding possession of the premises, nor is it conclusive as to the time of ouster, where the record in the former suit shows that all claims for such damages were withdrawn.—*Coburn v. Goodall*, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75. See also *Le Roy v. Rogers*, 30 Cal. 229, 89 Am. Dec. 88.

WRIT OF POSSESSION: All who come into the possession of land after action brought must, prima facie, go out under writ of possession, if the plaintiff recovers; for the presumption is, that they came in under the defendant. One who comes into possession under judgment collusively obtained against defendant in an action to recover possession of land, pending the action, must go out under a writ of possession against the defendant.—*Wetherbee v. Dunn*, 36 Cal. 147, 95 Am. Dec. 166.

A sheriff called upon to execute a writ of possession, has right to demand

indemnity of the plaintiff, before executing the writ, if he finds persons in possession who are not parties to the action or named in the writ, and who claim to be rightfully in possession, and there is reasonable doubt whether he has a right to turn them out; and this, although the premises are specifically described in the writ.—*Long v. Neville*, 36 Cal. 455, 95 Am. Dec. 199.

WRIT OF ASSISTANCE: A sheriff is bound to execute a writ of assistance at the earliest practicable moment after he receives it. He has no discretion whatever upon the subject, and cannot urge that *prima facie* the writ was executed with reasonable dispatch. Where a sheriff fails and re-

fuses to execute a writ of assistance, in opposition to the wishes and against the earnest protestation of the plaintiff, who accompanies him to the premises for the purpose of being put in possession, against whom the writ runs, destroy a number of valuable fixtures, and by their wilful and malicious acts injure the premises in other respects before the writ is executed, the sheriff will be liable for all damages thus done, however remote or unexpected.

A sheriff refusing to execute a writ is presumed to have known his duty, and to have acted in willful violation of it.—*Chapman v. Thornburgh*, 17 Cal. 87, 76 Am. Dec. 571.

Section 3380. When Plaintiff Cannot Recover Costs:

If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs.

1887 R. S. Sec. 4539.

Section 3381. Proceedings where Plaintiff's Title Terminates Pending Suit:

In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact and the plaintiff may recover damages for withholding the property.

1887 R. S. Sec. 4540.

Section 3382. When Value of Improvements can be Set-off:

When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damages.

1887 R. S. Sec. 4541.

Counter Claim: Sec. 3212.

PLEADING SET-OFF OF IMPROVEMENTS: A defendant who entered under a bond for a deed from the plaintiff, cannot set-off his improvements against the damages for use and occupation.—*Kilburn v. Ritchie*, 2 Cal. 145, 56 Am. Dec. 326.

MENSE PROFITS, VALUE OF IMPROVEMENTS: A defendant in ejectment who desires to set-off the value of his improvements against the mense profits must assert his right by proper

averments in his answer, or he is precluded from doing so at the trial.—*Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94.

VOID EXECUTOR'S SALE, IMPROVEMENTS: Under this section, in an action to recover land from the purchaser at a void executor's sale, no allowance can be made for improvements except as an off-set for damages claimed for withholding the possession.—*Huse v. Den*, 85 Cal. 390, 24 Pac. 790, 20 Am. St. Rep. 232.

Section 3383. Order for Survey and Inspection of Premises in Dispute:

Any person having a bona fide claim to the possession, title of, or interest in any real property or mining claim, including any ledges thereof, which is, or which he has good reason

to believe, is in the possession of another, either by surface or underground holdings or workings, and it is necessary for the ascertainment, enforcement or protection of such rights or interests, that an examination or survey of such property be had, and the person in the possession thereof, fails or refuses for three days after demand on him made in writing, to permit such examination or survey to be made, the party desiring the same may apply to the court or the judge thereof, whether he have an action concerning such property, pending in such court or not, for an order for such examination and survey.

Such application must be made upon a written petition or statement under oath, setting out a description of the property, interest of the party therein, that the premises are in the possession of a party, naming him, the reason why such survey or examination is asked, the demand made for same, and refusal thereof.

The court or judge must appoint a time and place for hearing, of which notice, with a copy of the petition, must be served upon the adverse party, at least three days before the hearing and one additional day for each twenty-five miles between the place of service of notice and the hearing, and such hearing must be had and the testimony must be produced in the same manner as provided by Section 3293 for hearings on injunctions.

If upon such hearing the court or judge is satisfied either party is entitled to any relief or order, for examination or survey of any property in the possession of the other, which has by the papers in the proceedings been put in controversy an order must be granted for such examination, survey and other privileges as the court or judge may deem just and the order must specify as nearly as possible what the person in whose favor such order is granted, may do.

That thereupon, such person may have free access, with such agents and assistants as may be allowed, to all parts of such property, with right to remove any loose rock, debris or other obstacle, when the same is necessary to the making of a full inspection or survey of such property, but no such removal must be made without the consent of the adverse party or the order of the court or judge permitting the same.

The court or judge may also upon proper showing, with the view of producing such evidence as may be needed to determine the rights of the parties, allow work to be done on such property, but any work so permitted must be allowed only after the same is particularly defined and must not be allowed in such manner as to interfere with the workings of the adverse party, and then only when the court is satisfied the adverse party is acting in bad faith and is infringing or attempting so to do, upon the rights of the party asking to do such work, and when there is no other reasonable or convenient mode for the production of the evidence necessary to settle the rights of the parties.

The party so asking to do work upon the premises of, or in the possession of another, must give good and sufficient security for the payment of all damages he may do the adverse party by reason of

such work and the court or judge must at every stage of the proceedings have due regard for the rights of all parties in interest.

1887 R. S. Sec. 4542.

Section 3384. Order. Service. Liability for Unnecessary Injury: The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement but if any unnecessary injury be done to the property, he is liable therefor.

1887 R. S. Sec. 4543.

Section 3385. Injunction During Foreclosure, After Sale on Execution: The court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or, after a sale on execution, before a conveyance.

1887 R. S. Sec. 4544.

Injunctions: Secs. 3283 et seq.

Section 3386. Damages for Injury to the Possession after Sale: When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, or any redemptioner, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale, and before possession is delivered under the conveyance.

1887 R. S. Sec. 4545.

Section 3387. Alienation Pending Suit, Action not Prejudiced: An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

1887 R. S. Sec. 4546.

Section 3388. Mining Claims, Actions Concerning, Local Rules: In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim and such customs, usages, or regulations, when not in conflict with the laws of this State, must govern the decision of the action.

1887 R. S. Sec. 4547.

LOCAL CUSTOMS, ETC.: Mining laws of district where mine is located will govern in the location and working of mines; and where such laws directly point out how mining claims must be located, and how possession once acquired is to be maintained, that course must be strictly pursued. The title presumed by courts in first appropriator of mining claim can only be a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired.

—Mallett v. Gold & Silver Mining Co. 1 Nev. 188, 90 Am. Dec. 484.

Custom of miners is entitled to great, if not controlling, weight.—Brown v. '49 and '56 Quartz Mining Co. 15 Cal. 152, 76 Am. Dec. 468.

Extract from, or single clause, of book of mining rules of district cannot be given in evidence without producing the whole of the rules in the book, where it is necessary to a fair understanding of any one part that the whole should be inspected.—English v. Johnson, 17 Cal. 107, 76 Am. Dec. 574.

CHAPTER CXLII.

POSSESSORY ACTIONS FOR PUBLIC LANDS.

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3389. Settlement required, several provisions.

3390. Claim, what to contain.

3391. Claim, how described, recording of.

Section.

3392. Must improve time.

3393. Action for possession, plaintiff what to prove.

Section 3389. Settlement Required, Several Provisions: Any person being a citizen of the United States, or having in accordance with law declared his intention to become a citizen, occupying and settled upon, any of the public lands of the United States in this State, for the purpose of cultivating or grazing the same, may commence and maintain any action for interference with, or injury to his possession of such land against any person interfering with or injuring the same; but if such land contains mines of any of the precious metals, the possession or claim of the person occupying the same for the purposes aforesaid must not prevent the working of such mines or persons desiring to work the same, as fully as if no such claim for agricultural or grazing purposes had been made thereon: *Provided*, That this Chapter must not be so construed as to allow a person, subsequent to the location of land for agricultural or grazing purposes, to go upon such lands for the purpose of mining without first paying the owner thereof the value of any growing crops they may destroy; this provision does not extend to any crops planted subsequent to their location for mining purposes; and this Chapter must not be construed to authorize the maintenance of any claim upon lands which at the commencement of any such action, may have been selected by the United States, and reserved for any purpose.

1887 R. S. Sec. 4552.

POSSESSORY RIGHTS, PRIOR POSSESSION, EVIDENCE OF TITLE:

It is a well settled rule in relation to possessory rights that prior possession is prima facie evidence of title.—*Fierbaugh v. Masterson*, 1 Idaho, 135.

PRIOR POSSESSION DEFINED: To entitle a party to hold by right of prior possession, there must be an actual bona fide occupation and possessio pedis, a subjection to the will and control.—*Fierbaugh et al. v. Masterson*, 1 Idaho, 135, citing *Plumb v. Seward*, 4 Cal. 95.

POSSESSION, CONTROL REQUIRED: It is not necessary that the occupant should cultivate the property claimed. It is sufficient if it be subjected to his use in the manner pointed out. Neither is any particular kind of enclosure required where a party is in possession of the land marked by distinct monuments or boundaries, whether the same be a natural or artificial enclosure. Claiming a title to the whole tract, the possession of the part so occupied will draw after it possession of

the whole.—*Fierbaugh v. Masterson*, 1 Idaho, 135.

PUBLIC LANDS, ACTUAL POSSESSION: In relation to public lands which are not mineral lands, the title as between the citizens of the territory where neither connects himself with the government, is considered as vested in the first possessor and to proceed from him. The possession must be actual and not constructive.—*Fierbaugh v. Masterson*, 1 Idaho, 135.

ACTUAL POSSESSION DEFINED: Where reliance is placed upon prior possession of the plaintiff or of parties through whom he claims, such possession must be shown to have been actual in him or them. By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial enclosure, or cultivation, or by appropriate use, according to the particular locality and quality of the property.—*Fierbaugh v. Masterson*, 1 Idaho, 135; citing *Coryell v. Cain*, 16 Cal. 567.

ACTUAL NOTICE SUFFICIENT: Where the lines are pointed out to the defendant by the plaintiff with reasonable accuracy, we see no good reason why its actual notice is not equally as good, so far as bringing home to the defendant a knowledge of the plaintiff's rights are concerned, as that afforded by stakes or like monuments.—*Fierbaugh v. Masterson*, 1 Idaho, 135.

REASONABLE TIME TO ENCLOSE: Having gone into the actual possession of a portion of the premises, they were entitled to a reasonable length of time in which to enclose them. What this length of time should be must, for the most part, depend upon the particular circumstances and locality of each claim.—*Fierbaugh v. Masterson*, 1 Idaho, 135.

POSSESSION OF PART: If a party were to locate and claim for agricultural purposes a tract of land, and were to reside upon, enclose, and cultivate a portion of the same, having artificial monuments sufficient to indicate generally the boundaries of the entire claim, this would most certainly be a substantial compliance with the rule, and such possession of a part would draw after it the possession of the whole.—*Fierbaugh v. Masterson*, 1 Idaho, 135.

CLAIM BY POSSESSION ALONE: If the public lands of the United States are claimed by virtue of possession alone, those claiming are bound to take such precautionary steps as will advise all the world of their rights. If the defendant placed in charge of his rights one who was untrue to his trust, that is his misfortune, and the plaintiff ought not to lose valuable rights thereby.—*Forsythe v. Richardson*, 1 Idaho, 459.

CONDEMNATION OF POSSESSORY CLAIM TO LANDS, CONSTRUCTION OF RAILROAD, COMPENSATION: A tract of unreserved land of the United States of an agricultural character, and located and settled, and buildings were erected upon it. Defendant, who was

qualified to take proceedings to obtain title under the pre-emption laws, bought the right of possession and improvements, took possession, made improvements, and continuously resided thereon, located the section and filed his declaration to hold it under the pre-emption laws and intended to obtain title thereunder when the land should be surveyed. The provisions for the condemnation of possessory claims for right of way was made by act of congress March 3, 1875, Rev. St. Idaho, Title 7. Held, that the defendant's possessory claim could not be taken for a right of way by the railroad company having no right to the land without compensation.—*Washington & I. R. R. Co. v. Osborne*, 2 Idaho, 527, 21 Pac. 421.

PUBLIC LANDS, PASTURABLE WITHOUT CLAIM OF TITLE, RIGHTS REQUIRED: The fact that a party has pastured the public land of the United States without claim of title or connecting himself therewith under some of the provisional acts will not give a legal or an equitable right to the pasture granted thereon.—*McGinnis v. Friedman*, 2 Idaho, 361, 17 Pac. 635.

SALE OF IMPROVEMENTS: Improvements on public lands being subject of sale constitute sufficient consideration to support a promissory note.—*Caldwell v. Ruddy*, 2 Idaho, 5, 1 Pac. 639.

Settlers for agricultural purposes upon mining lands are subject to the rights of miners, who may proceed in good faith to extract any valuable metals found there in the most practicable manner and with the least injury to the occupying claimant.—*McClintock v. Bryden*, 5 Cal. 97, 63 Am. Dec. 87, and extended note, pages 91 to 110.

A tenant in common can not acquire right of homestead to government land of which he is in possession for himself and his co-tenants.—*Reinhart v. Bradshaw*, 19 Nev. 255, 3 Am. St. Rep. 886.

Section 3390. Claim, what to Contain: Every claim, to enable the holder to maintain any action as aforesaid, must contain not more than one hundred and sixty acres of land, to be in a compact form, and so distinctly marked that the boundaries thereof may be easily traced.

1887 R. S. Sec. 4553.

Section 3391. Claim, how Described, Recording of: Every such claim must be accurately described in a written notice, which must be recorded in the office of the recorder of the county wherein the claim is situated, in a book to be kept for the purpose, together with an affidavit of the claimant setting forth:

First. That such claim does not embrace more than one hundred and sixty acres of land;

Second. That he holds no other claim under the provisions of this Chapter;

Third. That to the best of his information and belief, no part of said land is claimed under any existing adverse title.

1887 R. S. Sec. 4554.

Section 3392. Must Improve, Time: Within ninety days after the date of such record, said claimant must improve the land so recorded, unless the same has been previously improved by him, or some one through whom he claims, by putting such improvements thereon as partake of the realty to the value of two hundred dollars, and must continue to occupy and cultivate or graze the same or some portion thereof, either in person or by his agent or employe, and no person is entitled to maintain any such action unless he has complied with all the provisions of this Chapter.

1887 R. S. Sec. 4555.

Section 3393. Action for Possession, Plaintiff what to Prove: In any action for the possession of, or for any injury done to a lot or parcel of land, situated in any city, town, or village on the public lands, the plaintiff must be required to prove either an actual inclosure of the whole lot claimed by him, or the erection of a dwelling house or other substantial building, on some part thereof, by himself or some person through whom he claims, and proof of such building, with or without inclosure, is sufficient to hold such lot or parcel to the bounds thereof, as indicated by the plat of such city, town, or village, if there be one, and if there be no such plat, then to hold the same, with its full width and extent from and including such building to the nearest adjacent street, where the intervening space has not been previously claimed by adverse possession.

1887 R. S. Sec. 4556.

ABANDONMENT, EVIDENCE: An occupant upon the public domain of the United States, which land is thereafter platted into blocks, streets, and alleys, and entered as provided by an act of congress approved March 2, 1867, and known as the "Town Site Act," may lose whatever right he acquired by prior occupancy and possession by abandonment, and such abandonment may be inferred from his acts and declarations and from the declarations of such occupants and granter.—*Boise City v. Flanagan* (Idaho), 53 Pac. 453.

OCCUPANCY: An occupancy of one legal subdivision of a town site does not draw to it another legal subdivision, though contiguous to or immediately adjoining it.—*Thompson v. Holbrook*, 1 Idaho, 609.

GENERAL NOTE ON PUBLIC

LANDS, POWERS OF COMMISSIONERS OF PUBLIC LANDS, CANCELLATION OF FINAL RECEIPTS: The commissioner of the general land office of the United States has the power to cancel the final receipt or certificate issued to a pre-emption entryman at any time before patent is issued to such entryman, upon a proper showing made in accordance with the rules and regulations of the land department, that said entryman had obtained such certificate illegally and fraudulently.

The fact that such entryman had sold and conveyed the land so entered to an innocent purchaser, would not deprive the commissioner of the authority to cancel an entry illegally or fraudulently made.—*Jones v. Meyers*, 2 Idaho, 793, 26 Pac. 215; see also *Sorrenson v. Meyers*, 2 Idaho, 208, 26 Pac. 218.

CHAPTER CXLIII.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

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PARTIES, PROCESS AND PLEADINGS—RIGHT DETERMINED.

Section 3394. Who may Bring Actions for Partition:

When several co-tenants hold and are in possession of real prop-

erty as parceners, joint tenants or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition cannot be made without great prejudice to the owners.

1887 R. S. Sec. 4560.

Probate court, partition among heirs and devisees: Secs. 4282 and 4292.

Executors, etc., may bring suit for partition: Sec. 4211.

Guardian may join in and assent to partition: Sec. 4361.

Place of trial: Sec. 3179.

NATURE OF ACTION, EQUITABLE JURISDICTION: While the action for partition is statutory, the powers conferred upon the courts by the statute are substantially those formerly exercised by the chancery courts in pursuit of the same object, and the methods employed by the Code are, in the main, but a reflex of those pursued under the former equity practice, and the equities of the respective parties growing out of their ownership in the property, as tenants in common or otherwise, are taken into consideration and disposed of upon the broad principle which should govern courts of equity in the administration of justice.

MERGER: In an action for partition the interest of a tenant in common in an estate for years, which is subject to the partition will not be held to have been merged in the reversion owned by the same person.—*Jameson v. Hayward*, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268.

CO-TENANCY IN ESTATE FOR YEARS, SALE OF REVERSION: In an action for partition between tenants in common of an estate for years the court may refuse to order a sale of the reversion, of which one of the tenants is the sole owner.—*Jameson v. Hayward*, 106 Cal. 682, 39 Pac. 1078, 46 Am. St. Rep. 268.

ACTION BY TENANT IN COMMON FOR ACCOUNT OF RENTS AND PROFITS: One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his co-tenant in possession to account for the rents and profits received by him from tenants of the premises.—*Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540.

TENANTS IN COMMON, EFFECT OF SALE OF SPECIFIC PART OF LANDS: A conveyance by one tenant in common, or any number of them less than the whole, of a specific portion of the common lands is not void,

but can not be made to the prejudice of the tenants not uniting in the conveyance. Such conveyance does not sever the special tract from the general tract of which it is a part so far as the co-tenants of the grantor are concerned, and the whole tract is subject to partition, so far as the co-tenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made.

PARTIES: The holder of such special tract, as well as the co-tenants of his grantor, should be made parties to such action.—*Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139.

PARTITION COMMON PROPERTY: In an action for partition of the common property after a divorce, where it appeared that the property in question had been in the possession of the husband before marriage, without title, and that he purchased the property and obtained deeds therefore after marriage, the purchase money being paid with common funds. Held, that it was common property. Held, further, that the defendant having purchased, with the common funds, from another, under deed of warranty, he is estopped to deny, as far as plaintiff is concerned, that he acquired a good title by the purchase.—*Johnson v. Johnson*, 11 Cal. 200, 70 Am. Dec. 774.

"MINING RIGHT:" The mere right to go upon lands and take minerals therefrom is not an estate which can be the subject of an action for partition.—*Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880.

PARTITION PROCEEDINGS ARE SPECIAL: The proceedings for partition is a special proceeding, and the statute prescribes its course and effect; and though, after jurisdiction has attached, errors in the course of the cause can not be collaterally shown to impeach a judgment, yet, so far, at least as the rights of infants are involved, the court has no jurisdiction except over the matter of partition.

GUARDIANS AD LITEM, POWERS HOW RESTRICTED: Guardians ad litem, appointed to represent an infant in a case of partition, have power to defend for the infant solely against the claim set up for partition of the common estate; and their acts beyond this

special limited power are void. They have no power to admit away, by their answer, the rights of the infants, and the court has no power to give effect to such admission, as to a matter and

for a purpose not within the scope of their appointment or the purview of the complaint.—*Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212.

Section 3395. Interests of all Parties must be Set Forth in Complaint: The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any one of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

1887 R. S. Sec. 4561.

A complaint in partition which sets forth every particular required by the chapter on partitions, and sets out, not only the interests of the original co-tenants but also the interests of the respective heirs of a deceased co-tenant, is sufficient to give the court jurisdiction to make partition.—*Richardson v. Loupe*, 80 Cal. 490.

In an action of partition, the parties may assert any title that they may have, legal or equitable, and a full equitable title is a perfect title, which may be enforced in such an action, although limitation may have run against an action for specific performance of the contract to compel a conveyance.—*Luco v. De Toro*, 91 Cal. 405.

Section 3396. Lienholders not of Record need not be made Parties: No person having a conveyance of or claiming a lien on the property, or of some part of it, need be made a party to the action, unless such conveyance or lien appear of record.

1887 R. S. Sec. 4562.

Section 3397. Plaintiff must File Notice of lis Pendens: Immediately after filing the complaint in the district court, the plaintiff must file with the recorder of the county, or of the several counties in which the property is situated, either a copy of such complaint or a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of the filing it shall be deemed notice to all persons.

1887 R. S. Sec. 4563.

Section 3398. Summons must be directed to all Persons Interested: The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise upon the property, or upon any particular portion thereof and generally, to all persons unknown, who have or claim any interest in the property.

1887 R. S. Sec. 4564.

The appearance of a general guardian for infant defendants is sufficient to give the court jurisdiction of their persons in an action of partition.—*Richardson v. Loupe*, 80 Cal. 490, 22 Pac. 227.

AMENDED PLEADINGS: The right to answer an amended pleading is one of which a party can not be deprived, even after entry of default against him on the original pleading. The amendment of a pleading in matters of substance opens the default and the orig-

inal pleading, and the amended pleading must be served upon a defaulting defendant. In an action of partition, the bringing in of new parties, alleging that they have or claim an interest in the subject matter of partition, is an

amendment in matter of substance, requiring service of the amended complaint upon a defaulting defendant.—*Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52.

Section 3399. Unknown Parties may be Served by Publication: If a party having a share or interest is unknown, or any one of the known parties reside out of the State, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

1887 R. S. Sec. 4565.

Section 3400. Answer of Defendants, what to Contain: The defendants who have been personally served with the summons and a copy of the complaint, or who have appeared without such service, must set forth in their answers, fully and particularly, the origin, nature, and extent of their respective interest in the property, and if such defendants claim a lien on the property by mortgage, judgment or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon; also whether the same has been secured in any other way or not; and if secured, the nature and extent of such security, or they are deemed to have waived their right to such lien.

1887 R. S. Sec. 4566.

ANSWER IN PARTITION: A defendant in partition is not entitled to have the action dismissed by reason of the force and effect of any defense which he may set up in his answer.

DISCLAIMER IN PARTITION: An answer which disclaims all interest in the land in dispute, except such as the defendant may have under the homestead law, by virtue of the dedication of the land to homestead uses by him-

self and wife, is not a disclaimer. A disclaimer must be in absolute and unconditional terms.—*De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81.

A so-called cross-complaint in an action for partition which is only a repetition of the answer which alleges exclusive ownership and exclusive possession by defendant requires no answer from the plaintiff.—*Banning v. Banning*, 80 Cal. 271, 22 Pac. 210.

Section 3401. Rights of all Parties must be Ascertained: The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties before such judgment is rendered except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

1887 R. S. Sec. 4567.

JURISDICTION, DETERMINATION OF HOSTILE CLAIMS: Sections 759 and 774 of the Cal. Code of Civil Procedure (Sec. 3401 and 3431, Idaho), so

far as applying to the determination by the court of questions of title, as between hostile claimants to any share or parcel, or to the proceeds of the sale thereof, are to be construed as limited

to the determination of issues over which the court in which the partition proceedings are pending has jurisdiction, and not as applicable to the determination of hostile claims to the estate

of a deceased co-tenant, over which the probate court has exclusive jurisdiction.—*Grant v. Murphy*, 116 Cal. 427, 48 Pac. 481, 58 Am. St. Rep. 188.

Section 3402. Partial Partition: Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made as if such original co-tenants were the parties, and sole parties, in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof as they may desire.

1887 R. S. Sec. 4568.

Under this section the court may ascertain and determine the interests of the original co-tenants and make partition between them, and may allow the heirs of the decedent, at their request,

to remain tenants in common of the portion allotted to the state, subject to administration and final distribution thereof.—*Richardson v. Loupe*, 80 Cal. 490, 22 Pac. 227.

REFEREES. APPOINTMENT. DUTIES. REPORT. JUDGMENT.

Section 3403. Court may Order Sale or Partition and Appoint Referees therefor: If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. Otherwise, upon the requisite proofs being made, it must order a partition, according to the respective rights of the parties, as ascertained by the court, and appoint three referees therefor; and must designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained.

1887 R. S. Sec. 4571.

COMPLAINT IN PARTITION: In a complaint to obtain partition of land, a general allegation that "the premises can not be divided by metes and bounds without prejudice," is sufficient, without an allegation of the facts upon which the plaintiff relies, to obtain a particular mode of partition. A complaint in partition is good which is silent upon the mode of partition.

PARTIES TO SUIT FOR PARTITION: A married woman whose husband is sued in partition is a necessary party if she claims a homestead right to or an interest in the property in dispute.—*Du Uprey v. Du Uprey*, 27 Cal. 329, 87 Am. Dec. 81.

In a suit for partition, the court

should not decree sale of the property, except in cases where a division thereof would manifestly be injurious to the interests of the co-tenants.—*Dall v. Confidence Silver Mining Co.* 3 Nev. 531, 93 Am. Dec. 419.

PARTIES: As a general rule, all the parties in an action for partition are actors, and each party may set up in his pleadings his interest in the premises and have it ascertained and adjudicated, and such adjudication must appear in the interlocutory decree, in order to its validity, whether there is to be a strict partition, or the case is one where the premises can not be divided and must be sold.—*Grant v. Murphy*, 116 Cal. 427, 48 Pac. 481, 58 Am. St. Rep. 188.

Section 3404. Court, by Consent may Appoint a Single Referee: The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this Chapter; and the single referee, when thus appointed, has all the powers and may perform all the duties required of the three referees.

1887 R. S. Sec. 4605.

Richardson v. Loupe, 80 Cal. 490, 22 Pac. 227.

General guardian may consent to single referee on behalf of minor ward.—

Section 3405. Partition must be made According to Rights of the Parties: In making the partition the referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this Chapter, designating the several portions by proper landmarks, and may employ a surveyor, with the necessary assistants, to aid them.

1887 R. S. Sec. 4572.

Referee's must all meet, when three, but two may act: Sec. 3747.

Section 3406. Referees must Make Report of Their Proceedings: The referees must make a report of their proceedings, specifying the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share.

1887 R. S. Sec. 4573.

Section 3407. Proceedings upon Report, Judgment and Effect: The court may confirm, change, modify, or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property or of any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication;

3. On all other persons claiming from such parties or persons or either of them. And no judgment is invalidated by reason of the death of any party before final judgment or decree: but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death.

1887 R. S. Sec. 4574.

Appeal to supreme court from order in, within what time: Sec. 3573.

TION: In an action for partition, if the court finds that the parties hold and are in possession of real property, as joint tenants or as tenants in com-

FACTS TO BE FOUND IN PARTI-

mon, in which one or more of them have an estate of inheritance, or for life or lives, or for years, the partition should be made, although the findings may also show that the plaintiff, in his complaint, has incorrectly set forth the title of interest of the parties, or of one or more of them, in the land.—*De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81.

INFANTS, RIGHTS OF UNDER DECREE OF PARTITION: A bill of review lies by an infant to set aside a decree rendered in a suit against him for partition of common estate, where the decree would operate as a cloud on, or embarrassment to the title, and where the court had no jurisdiction.—*Waterman v. Lawrence*, 19 Cal. 219, 79 Am. Dec. 212.

WAY OF NECESSITY, ALLOTMENT: "Where land allotted by order of the court in a proceeding for partition is so situated that one of the parties would be entitled to a way of necessity, if an allotment were made by deed from all other tenants in common, the effect of the allotment by order of the court is to create a way of necessity.—*Blum v. Weston*, 102 Cal. 362, 36 Pac. 778, 41 Am. St. Rep. 188.

SCOPE OF ACTION: The whole scope and tenor of the provisions of the statute relating to partition of lands show that the intention was to make the one judgment of partition final and conclusive on all persons interested in the property or any part of it of whom the court could acquire jurisdiction. Such actions, both in respect to the

modes of procedure prescribed and the remedies provided, partake more fully of the rules and principles of equity than those of law.

PRACTICE, EVIDENCE: On a new trial of an action for the partition of lands ordered by this court on appeal, the parties are entitled to use the documentary evidence, maps, exhibits, etc., used at the former trial and remaining on file in the court below, including the report of the testimony as taken by the referees before whom such trial was had, subject, however, to objections as when first ordered.—*Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139.

SEVERAL TRACTS, EFFECT OF REVERSION TO ONE TENANT, DEFAULT: A judgment for the partition of several tracts of land can not be piece-meal as to any one tract, and the reversal of the judgment, upon appeal of such of the defendants as have appeared, sets aside the whole judgment as to such tract as against a defendant against whom a judgment by default had been entered.—*Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52.

JUDGMENT: A judgment in partition is conclusive upon all the parties thereto as to whatever title or claim they had to the land at the time of the rendition of the judgment.—*Christy v. Spring Valley Water Works*, 63 Cal. 73, 8 Pac. 849, as to the effect of final and interlocutory decrees, see *Christy v. Spring Valley Water Works*, 97 Cal. 21, 31 Pac. 1110.

Section 3408. Judgment not to Affect Tenants for Years: The judgment does not affect tenants for years less than ten to the whole of the property which is the subject of the partition.

1887 R. S. Sec. 4575.

SALES, METHOD, TERMS, CREDIT AND SECURITY.

Section 3409. Sales by Referees must be at Public Auction: All sales of real property made by referees, under this Chapter, must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property or any part of it is to be subject to a prior estate, charge or lien, that must be stated in the notice.

1887 R. S. Sec. 4583.

Section 3410. Court must Direct Terms of Sale or Credit: The court must, in the order of sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required by the provisions here-

inbefore contained, to be invested for the benefit of unknown owners, infants or parties out of the State.

1887 R. S. Sec. 4584.

Section 3411. Referees may Take Securities for Purchase Money: The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase money, of such parts of the property as are directed by the court to be sold on credit for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant in the name of the guardian of such infant; and for other shares in the the name of the clerk of the court and his successors in office.

1887 R. S. Sec. 4585.

Section 3412. When Interests of Parties Ascertained. Securities Taken in Their Names: When security is taken by the referees on a sale, and the parties interested in such security by an instrument in writing, under their hands, delivered to the referee, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of and payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk.

1887 R. S. Sec. 4598.

Section 3413. Terms must be Made Known. Lots Sold Separately: In all case of sales of property the terms must be made known at the time; and if the premises consist of distinct farms or lots, they must be sold separately.

1887 R. S. Sec. 4590.

Section 3414. Who may not be Purchasers: Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this Section are void.

1887 R. S. Sec. 4591.

REPORT, CONFIRMATION, AND CONVEYANCE.

Section 3415. Referees must Make a Report of Sale: After completing a sale of the property, or any part thereof ordered to be sold, the referees must report the same to the court with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk.

1887 R. S. Sec. 4592.

Section 3416. If Confirmed Conveyances may be Executed: If the sale be confirmed by the court, an order must be

entered directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

1887 R. S. Sec. 4593.

CONFIRMATION OF SALE: Agreement between a purchaser at a partition sale and a tenant in common, who believes that the common property has been sold for much less than its value, that the latter will not object to such sale, and will permit it to be confirmed by the court, and that the former will thereupon pay the latter one thousand dollars, is a fraud upon the court and the parties to the action, and no court will aid either party to enforce it.—*Tappan v. Albany Brewing Co.* 80 Cal. 570, 22 Pac. 257, 13 Am. St. Rep. 174.

An order confirming a sale in partition is appealable by the purchaser, who becomes a quasi party to the suit,

and becomes conclusive upon him upon his failure to appeal therefrom; and he becomes thereby legally bound to complete the purchase, notwithstanding objections made by him to defects in the title.

ORDER OF RESALE AT RISK OF PURCHASER: Upon the refusal of a purchaser to complete a sale in partition which has been confirmed, the court may order the property resold at the purchaser's risk and the purchaser is bound by such order, if he has notice of it, and if not, he should move to vacate or modify the order, and should take an appeal upon the denial of his motion.—*Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167 and note.

Section 3417. Proceeding if a Lienholder Becomes a Purchaser: When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

1887 R. S. Sec. 4594.

Section 3418. Conveyance must be Recorded, a Bar Against Parties: The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

1887 R. S. Sec. 4595.

EQUAL DIVISION IMPRACTICABLE, COMPENSATORY ADJUSTMENTS.

Section 3419. When Unequal Partition Ordered, Compensation Adjudged: When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the court has power to make compensatory adjustment between the respective parties according to the ordinary principles of equity.

1887 R. S. Sec. 4600.

SETTLEMENT WITH TENANT FOR LIFE OR YEARS. FUTURE ESTATES.

Section 3420. Estate for Life or Years in Part of Property: When a part of the property only is ordered to be sold, if there be an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

1887 R. S. Sec. 4578.

Section 3421. Tenants Whose Estate has been Sold Shall Receive Compensation: The person entitled to a tenancy for life or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing filed with the clerk of the court. Upon the filing of such consent the clerk must enter the same in the minutes of the court.

1887 R. S. Sec. 4586.

Section 3422. The Court May Fix Such Compensation: If such consent be not given, filed and entered as provided in the last Section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party or deposited in court for him, as the case may require.

1887 R. S. Sec. 4587.

Section 3423. The Court Must Protect Tenants Unknown: If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights in the same manner as far as may be, as if they were known and had appeared.

1887 R. S. Sec. 4588.

Section 3424. Court Must Ascertain and Secure Future, Contingent or Vested Interests: In all cases of sales when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties.

1887 R. S. Sec. 4589.

LIENHOLDERS.

Section 3425. Lienholders Must be Made Parties, or Referee Appointed: If it appears to the court, by the certificate of the county recorder or clerk, or by the sworn or verified statement of any person who may have examined or searched the records that there are outstanding liens or incumbrances of record upon

such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action, by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid, or if not paid, what amount remains due thereon, and their order among the liens or incumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.

1887 R. S. Sec. 4569.

Section 3426. Lienholders Must be Notified to Appear Before Referee: The plaintiff must cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed as provided in the last Section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof by his own affidavit or otherwise, of the amount due or to become due, contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication or notice, to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.

1887 R. S. Sec. 4570.

Section 3427. Lien on Undivided Interest, a Charge only on Share Assigned to Such Party: When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien.

1887 R. S. Sec. 4577.

Section 3428. Application of Proceeds of Sale of Incumbered Property: The proceeds of the sale of incumbered property must be applied under the direction of the court as follows:

1. To pay its just proportion of the general costs of the action;
2. To pay the costs of the reference;
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due the amount due to be verified by affidavit at the time of payment;
4. The residue among the owners of the property sold, according to their respective shares therein.

1887 R. S. Sec. 4579.

Section 3429. Party Holding Other Securities Required to Exhaust Them: Whenever any party to an action who holds a lien upon the property, or any part thereof, has other

securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just reduction to be made from the amount of the lien on the property on account thereof.

1887 R. S. Sec. 4580.

Section 3430. Proceeds of Sale, Disposition of: The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court or deposited therein, or as directed by the court.

1887 R. S. Sec. 4581.

Section 3431. Cause May be Continued for the Determination. Claims After Sale: When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings as in an original action.

1887 R. S. Sec. 4582.

JURISDICTION, DETERMINATION OF HOSTILE CLAIMS: Sections 759 and 774 of the Cal. Code of Civil Procedure (Secs. 3401 and 3431 Idaho), so far as applying to the determination by the court of questions of title, as between hostile claimants to any share or parcel, or to the proceeds of the sale thereof, are to be construct-

ed as limited to the determination of issues over which the court in which the partition proceedings are pending has jurisdiction, and not as applicable to the determination of hostile claims to the estate of a deceased co-tenant, over which the probate court has exclusive jurisdiction.—*Grant v. Murphy*, 116 Cal. 427, 48 Pac. 481, 58 Am. St. Rep. 188.

INVESTMENT OF PROCEEDS; UNKNOWN UNREPRESENTED OWNERS.

Section 3432. Proceeds Belonging to Parties Unknown Must be Invested: When there are proceeds of sale belonging to an unknown owner, or to a person without the State, who has no legal representative within it, the same must be invested in securities at interest for the benefit of the person entitled thereto.

1887 R. S. Sec. 4596.

Section 3433. Investment Must be Made in Name of: When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made it must be done, except as herein otherwise provided, in the name of the recorder of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

1887 R. S. Sec. 4597.

Section 3434. Duties of Making Investments: The recorder in whose name a security is taken, or by whom an invest-

ment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must deposit with the county treasurer all securities taken and keep an account in a book provided and kept for that purpose in the recorder's office, free for inspection, by all persons of investments in moneys received by him thereon, and the disposition thereof.

1887 R. S. Sec. 4599.

RELATING TO MINORS, INCOMPETENTS AND GUARDIANS.

Section 3435. Share of an Infant Paid to His Guardian: When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

1887 R. S. Sec. 4601.

Section 3436. Share of Insane Person Payable to Guardian: The guardian who may be entitled to the custody and management of the estate of an insane person or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive in behalf of such person, his share of the proceeds of such real property from the referees on executing, with sufficient sureties, an undertaking approved by a judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled or to his legal representative.

1887 R. S. Sec. 4602.

Section 3437. Guardian May Consent to Partition Without Action: The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled and may execute a release in his behalf to the owners of the shares of the parts to which they may be respectively entitled, upon an order of the court.

1887 R. S. Sec. 4603.

COSTS.

Section 3438. Costs of Partition a Lien upon Shares of Parceners: The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall

be lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expenses of such litigation to be paid by the parties thereto, or any of them.

1887 R. S. Sec. 4604.

The amount of an attorney's fee to be allowed in an action for partition, is a question of fact, to be determined by

the trial court from the evidence.—

Watson v. Sutro, 103 Cal. 169, 37 Pac. 201.

Section 3439. Abstract of Title: If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any one of the defendants shall have had such abstract afterwards made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties to the action. must be allowed and taxed.

1887 R. S. Sec. 4606.

Section 3440. Expenses of Partition. Apportionment: The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action, equitably.

1887 R. S. Sec. 4576.

CHAPTER CXLIV.

ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

Section.

3441. Nature of action.

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Section.

3446. Damages may be recovered by successful applicant.

3447. When several persons claim same office.

3448. If defendant found guilty, what judgment to be rendered.

3449. Undertaking, when required.

Section 3441. Nature of Action: An action may be brought in the name of the people of the State against any person who usurps, intrudes into, holds or exercises any office or franchise, real or pretended, within this State, without authority of law.

1887 R. S. Sec. 4612; first part.

Mandamus, remedy by, to compel admission to office or right, denied by tribunal, corporation, board or person: Sec. 3769.

DISTRICT COURT JURISDICTION:

An action for the usurpation of an office in the nature of a quo warranto, brought in the name of the people, on

the territorial side of the district court, for the removal of a county officer, is properly brought.—*People v. Curtis*, 1 Idaho, 753. Held, proper remedy to try title to office of clerk of probate court where it was alleged that claimant held office under an unconstitutional law.—*Hampton v. Dilley*, 2 Idaho, 1157, 31 Pac. 807.

INTERVENTION: The right of intervention given by statute exists only in actions which are purely civil in their character. The statutory proceeding in the nature of a quo warranto is quasi criminal in character, and in such action the right does not exist.—*People ex rel. Glidden v. Green*, 1 Idaho, 235.

The action herein provided for is a civil action and an oral plea of "not guilty" is insufficient.—*People v. Superior Court*, 114 Cal. 466, 46 Pac. 383.

QUO WARRANTO, USURPATION OF CORPORATE FRANCHISE: In a

proceeding by the state in the nature of a quo warranto to deprive a corporation de facto of its corporate charter and procure its dissolution on the ground of a want of substantial compliance with the statutory requirements in its formation, the corporation de facto is a necessary party, and making it such, with the averment that it is a corporation de facto, but not de jure, does not estop the state from questioning its corporate charter.—*People v. Montecito Water Co.* 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172, and note.

Section 3442. Who May Prosecute: Such action shall be brought by the prosecuting attorney of the proper county, when the office or franchise relates to a county, precinct or city, and when such office or franchise relates to the State, by the attorney general; and it shall be the duty of the proper officer, upon proper showing, to bring such action whenever he has reason to believe that any such office or franchise has been usurped, intruded into, held or exercised without authority of law. Any person rightfully entitled to an office or franchise may bring an action in his own name against the person who has usurped, intruded into, or who holds or exercises the same.

1887 R. S. Sec. 4612; last part.

Section 3443. Order of Arrest in Certain Cases: Whenever such action is brought in the name of the people of the State, the prosecuting attorney at the request of the person entitled to the office or franchise, in addition to the cause of action in behalf of the people of the State, may set forth the name of the person so entitled, with a statement of his right thereto, and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of usurpation thereof, an order may be granted by the judge, or court wherein the case is pending, for the arrest of such defendant, and holding him to bail; and thereupon he may be arrested and held to bail, in the same manner and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

1887 R. S. Sec. 4613.

QUO WARRANTO, TITLE TO OFFICE, JURY TRIAL: An action under act January 30, 1885, to try title to an office to which there are several claimants is one of legal and not of equitable cognizance. The issues in such action or proceedings are legal ones and

the trial of such issues by jury is a constitutional rights of the parties.

Note.—This section was so amended by Rev. St. of 1887 as to eliminate the provisions denying the right of trial by jury.—*People v. Havrid*, 2 Idaho 498, 25 Pac. 294.

Section 3444. Judgment May Determine Rights of Both Incumbent and Claimant: In every such case judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant as the form of the action and justice may require.

1887 R. S. Sec. 4614.

Provisions relating to stay of proceedings pending appeal: Sec. 3583.

An appeal lies from an order granting or refusing a new trial in an action for the usurpation of a franchise, brought

under the provisions of Sec. 803 Cal. Code of Civil Procedure (3441 Idaho) and a motion to dismiss such appeal

must be denied.—*People v. City of Oakland*, 123 Cal. 145, 55 Pac. 772.

Section 3445. When Rendered in Favor of Applicant: If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law to take upon himself the execution of the office.

1887 R. S. Sec. 4615.

Section 3446. Damages May be Recovered by Successful Applicant: If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover by action, the damages which he may have sustained by reason of the usurpation of the office by the defendant.

1887 R. S. Sec. 4616.

DAMAGES FOR USURPATION OF OFFICE: The fact that the office in controversy has ceased through the adoption of a new city charter, is not ground for abatement of quo warranto proceedings, as under the statute governing the subject, if the relator should

be found entitled to the office he would be entitled to recover any damages sustained through usurpation of the office by the defendant, and the prosecution of the proceeding is essential to determine whether he has a right to such damages.—*People v. Rodgers*, 118 Cal. 397, 40 Pac. 740 and 50 Pac. 668.

Section 3447. When Several Persons Claim Same Office: When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons in order to try their respective rights to such office or franchise.

1887 R. S. Sec. 4617.

ACTIONS FOR THE USURPATION OF OFFICE OR FRANCHISE: Justice Whitson in discussing the case of *Lindsay v. People*, in 1 Idaho, page 438, in construing Section 279 of the practice act of 1864 (Sec. 4617 of the Rev. Stats.) says: "There is no such action known to common law as contesting an election before user, and no authority has been conferred on the district court by statute for trying the title, except by an action which has taken the place of the old action of quo warranto."

Justice Hollister, in the same case, on pages 452 to 456, contends that an action may be commenced under this section to determine the rights of several parties, who claim the right to an office, even though none of them be in the actual possession of the office, and the term for which they are contesting has not yet commenced. See Justice Hollister's concurring opinion for an

elaborate discussion of Sections 4456 and 4461.

ACTION FOR USURPATION OF AN OFFICE OR FRANCHISE, ERROR OF JUDGE AT CHAMBERS, HOW CORRECTED: The district court has jurisdiction to determine the rights of several parties, who claim to be entitled to the office of sheriff, and the judge of that court may properly decide in such case, whether it is necessary to allege in the complaint that there has been an actual usurpation of the office, and if there be error in the ruling, such error may be corrected on appeal.—*People ex rel. Huston v. Lindsay*, 1 Idaho, 394.

In an action of quo warranto to determine the validity of the election for school trustees, all the defendants claiming to be elected are properly joined as defendants; and there is no improper joinder of several causes of action against them.—*People v. Prewett*, 124 Cal. 7, 56 Pac. 619.

Section 3448. If Defendant Found Guilty, What Judgment to be Rendered: When a defendant against whom such action has been brought is adjudged guilty of usurping or intruding into or unlawfully holding any office, franchise or privilege, judgment must be rendered that such defendant be excluded from

the office, franchise or privilege, and that he pay the costs of the action. The court may also, in its discretion, in action to which the people of the State are a party, impose upon the defendant a fine not exceeding five thousand dollars, which fine, when collected, must be paid into the treasury of the State.

1887 R. S. Sec. 4618.

Section 3449. Undertaking, When Required: When the action is brought upon the information or application of a private party, the prosecuting attorney may require such party to enter into an undertaking, with sureties to be approved by the said officer, conditioned that such party or the sureties will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and expenses incurred in the prosecution of the action.

1887 R. S. Sec. 4619.

CHAPTER CXLV.

TRIALS IN CIVIL ACTIONS.

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ISSUES, MODE OF TRIAL, AND POSTPONEMENTS.

Section 3450. Issue Defined. Kinds: Issues arise upon the pleadings when a fact or a conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact,

1887 R. S. Sec. 4365.

The provisions of this chapter are applicable to trials on appeal from justices' court: Sec. 3689.

Proceedings on appeal from Board of County Commissioners: See Sec. 1611, Political Code.

Section 3451. Issue of Law, How Raised: An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

1887 R. S. Sec. 4366.

Section 3452. Issue of Fact, How Raised: An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; and,
2. Upon new matters in the answer, except an issue of law is joined thereon.

1887 R. S. Sec. 4367.

Creditor opposing discharge of insolvent, issues how formed, trial of: Sec. 3938.

Issues in proceedings against joint debtors after judgment, how framed and tried: Secs. 3702 and 3703.

Section 3453. Issue of Law, How Tried: An issue of law must be tried by the court, unless it is referred upon consent.

1887 R. S. Sec. 4368.

Section 3454. Issues, by Whom tried, and Order of Trial: In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where, in these cases, there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court subject to its power to order an issue to be referred to a referee, as provided in this Code.

1887 R. S. Sec. 4369.

Mandamus proceedings, trial of issue of facts in: Secs. 3774 and 3775.

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Trial, rules of equity jurisprudence prevail over common law: Sec. 3112.

Judge pro tempore, district court, when cause may be tried by, who may be, how appointed: Sec. 12, Art. V, State Const.

Consolidation of actions, court may order those which might have been originally joined: Sec. 3741.

Waiver of jury trial: Sec. 3482.

Reference: Secs. 3487 to 3494.

Trial by jury: Secs. 3459 to 3481.

Trial by court: Secs. 3482 to 3486.

Recognizes distinction between law and equity: Section 4369, Rev. St., recognizes a distinction between law and equity.—Brady v. Yost (Idaho), 25 Pac. 542.

EQUITABLE ACTION, JURY; EQUITABLE ACTIONS: No action, purely equitable in character, can proceed to a decree upon the verdict of a jury as the foundation thereof; but if a jury is called in such a case, it must be to aid the court in determining questions of fact, which, when found, are the findings of the court; and the decree must be the result of the judgment of the court or the judge thereof.—Ramsay v. Hart, 1 Idaho, 423.

EQUITY, PRACTICE, SUBMISSION OF ISSUES: On a trial of a cause in equity it is within the discretion of the court to submit both legal and equitable issues to the jury at the same time.—Houser v. Austin, 2 Idaho, 188, 10 Pac. 37.

EQUITY ISSUES, JURY, INSTRUCTIONS: Alleged errors of a trial court in an equity case, in giving or refusing to give instructions to a jury called to assist the court, are immaterial and will

not be reviewed on appeal. The propriety of giving instructions in such case is doubtful.

Issues of fact in an equity case are properly presented to the jury by interrogatories, but there should be only one series of interrogatories in such case, and such interrogatories should cover the material questions in dispute.—Kelly v. Perrault (Idaho), 48 Pac. 45.

EQUITY, JURY FINDING, ADVISORY: In equity suits, the specific findings of a jury are advisory only. The court may disregard such findings when they are clearly against the evidence.—Brady v. Yost (Idaho), 55 Pac. 542.

Record in case involving questions both of law and equity which is tried without a jury should show that the equitable issues were first disposed of, if that course was followed; or if the whole action and all the issues were tried and submitted together, that fact should appear.—Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

Issues respecting the legal title to land were triable at law at the time the constitution was adopted, and either party is therefore entitled to a jury trial thereof under the provision of the state constitution declaring that the right of trial by jury shall be secured to all, and remain inviolate.—Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283.

Whether a court shall submit special issues to a jury is a matter within its own discretion.—Schultz v. McLean, 109 Cal. 437, 42 Pac. 557.

Section 3455. Clerk Must Enter Causes on Calendar:

The clerk must enter causes upon the calendar of the court according to the date of issue. Causes once placed on the calendar must remain upon the calendar from court to court, until finally disposed of; *Provided*, That causes may be dropped from the calendar by consent of parties, or by order of court, and may be again restored upon notice.

1887 R. S. Sec. 4370.

Section 3456. Parties May Bring Issue to Trial:

Either party may bring an issue to trial, or to a hearing, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case and take a dismissal of the action, or a verdict, or judgment, as the case may require.

1887 R. S. Sec. 4371.

Judgment of dismissal or non-suit: Sec. 3499.

Actions pending at death of defendant, no recovery unless claim presented to administrator: Sec. 4149.

POSTPONEMENT OF TRIAL.

Section 3457. Motion to Postpone Trial, Requisites of: A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of

the evidence expected to be obtained, and that due diligence has been used to procure it. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.

1887 R. S. Sec. 4372.

Postponement of election contest: Sec. 3803.

Postponement of trial to take deposition: Sec. 4499.

Continuance when depositions are not filed one day before cause stands for trial: Sec. 4514.

Postponement of trial, and order for trial before another judge or jury when judge or juror called as a witness: Sec. 4407.

Payment of costs may in discretion of court be imposed as condition of continuance: Sec. 3727.

DISCRETION OF COURT: Postponing a trial rests in the sound discretion of the court, and the appellate court will not review that discretion, unless there appears to have been a very gross abuse of its exercise.—*Cox v. Northwestern Stage Company*, 1 Idaho, 375.

NOT ARBITRARY DISCRETION: An application for a continuance is one addressed to the discretion of the court before which it was made. By this it is not meant an arbitrary discretion, controlled by caprice or whim, but a sound and impartial discretion, which should be supported by all the facts and circumstances appertaining to the case. It belongs to that class of applications which cannot in the nature of things, be defined with such accuracy and certainty, as is attainable in other cases, and hence, while there is some approximation to rules in matters of discretion, it is only approximation and nothing more, and hence, courts of review have uniformly refused to disturb a ruling on such questions, unless it is shown that the discretion was abused, and the ruling arbitrary.—*Herron v. Jury*, 1 Idaho, 164.

DUE DILIGENCE REQUIRED: A party is not entitled to a continuation of a case without showing due diligence and the use of legal means to procure the desired evidence. A bare request to

furnish the evidence, is in no sense a compliance with the requirements of the law.—*Alvord v. United States*, 1 Idaho, 585.

SAME, ABSENT WITNESS: Where a witness is beyond the reach of the process of the court, a party desiring his testimony must sue out a commission and take his deposition, and a failure to do so shows a want of due diligence and a neglect to use the proper means to obtain the evidence.—*Alvord et al. v. United States*, 1 Idaho, 585.

ABSENCE OF MATERIAL WITNESS: Upon an affidavit showing the absence of a material witness and that proper diligence has been exercised, a party is entitled to a continuance.—*Lilienthal & Co. v. Anderson*, 1 Idaho, 673.

ABSENCE OF WITNESS, ADMITTING AFFIDAVIT AS TO TESTIMONY: Where, in a criminal action, the defendant applies for a continuance on the ground of absent witnesses, and the prosecution admits that the witness, if present, would testify to the facts as stated in the affidavit, and that such evidence, if proper, be considered as actually given, the affidavit thereby becomes evidence, but not conclusive of its contents; and it is not error for the court, after such admission, to deny the continuance.—*Territory v. Guthrie*, 2 Idaho, 398, 17 Pac. 39.

GROUND OF CONTINUANCE DISMISSAL NOT WITHSTANDING CROSS-COMPLAINT: Though the former judgment cannot be pleaded in bar to another action or cross-complaint for the same cause while the former action is pending, yet the pendency of the action is good ground for a continuance of the latter action until the former action is finally determined, and would be good ground for dismissal of the latter action in which a cross-complaint is filed upon the same cause of action.—*Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314.

Section 3458. In Cases of Adjournment Party May Have Testimony of Witness Taken: The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate, which must accordingly be

done; and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witnesses were produced.

1887 R. S. Sec. 4373.

TRIAL BY JURY.

Section 3459. Jury, How Drawn: When the action is called for trial by jury, the clerk must draw from the trial jury box of the court, the ballots containing the names of the jurors, until the jury is completed or the ballots are exhausted.

1887 R. S. Sec. 4378.

Number of jurors in district court: Sec. 3047 and Art. I. Sec. 7, State Const.

Provisions relating to selection, drawing, summoning, qualifications, competency, exemptions, excuses and preparations of trial jury box: Chap. CXXIII, Secs. 3043 to 3083.

Waiver of trial by jury: Sec. 3482.

Trial, the provisions of this chapter are applicable to trials on appeal from justices' court: Sec. 3689.

Forcible entry and detainer, parties entitled to trial by jury: Sec. 3987.

Trials, interference with or conversing with jurors as to the merits of the action is punishable as contempt: Sec. 3819.

Trials, to be public except in certain cases: Sec. 3012.

JURY TRIAL, ABSENCE OF JUDGE FROM COURT ROOM: The fact that during the trial of a criminal case the judge of the court absented himself from the court room, so as to be out of sight and hearing of the proceedings going on therein, is ground for a new trial.—*People v. Tupper*, 122 Cal. 424, 55 Pac. 125, 68 Am. St. Rep. 44.

Section 3460. Challenges, Peremptory, How Taken: Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

1887 R. S. Sec. 4379.

NUMBER OF PEREMPTORY CHALLENGES, SEVERAL PARTIES: The legislature did not intend, when in an action there are several parties on either side, that each individual should have four peremptory challenges, but that they should join and have one set on either side.—*United States v. Alexander*, 2 Idaho, 354, 17 Pac. 746.

PEREMPTORY CHALLENGE, INCOMPETENT JUROR, JURY, CHALLENGES: Where a juror who is in-

competent under the statute swears **falsely on examination** on his voir dire and thereby compels plaintiff to exhaust one of his peremptory challenges to exclude him, and, before the jury is completed plaintiff discovers that said juror was incompetent, and offers to make proof thereof, he should be permitted to do so; and upon satisfactory proof being made, his peremptory challenge should be restored to him.—*Burke v. McDonald*, 2 Idaho, 1022, 29 Pac. 98.

Section 3461. Grounds of Challenge: Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this Code to render a person competent as a juror;
2. Consanguinity or affinity within the fourth degree to any party;
3. Standing in the relation of debtor or creditor, guardian and ward, master and servant, employer and clerk, or principal and agent to either party or being a member of the family of either party, or a partner, or united in business with either party, or surety on any bond or obligation of either party;

4. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action, or being then a witness or subpoenaed therein;

5. Pecuniary interest on the part of the juror in the event of the action or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation;

6. Having an unqualified opinion or belief as to the merits of the action, or main question involved therein, founded upon knowledge or information of its material facts or of some of them;

7. The existence of a state of mind in the juror evincing enmity against or bias to or against either party.

1887 R. S. Sec. 4380.

Sub. 2. Consanguinity or affinity,

Sub. 1. Qualifications of jurors: Sec.

generally: Sec. 3029.

3049; who incompetent: Sec. 3050;

who exempt: Sec. 3051.

Section 3462. Challenges, How Tried: Challenges for cause must be tried by the court. The juror challenged and any other person, may be examined as a witness on the trial of the challenge.

1887 R. S. Sec. 4381.

JURY, CHALLENGE FOR CAUSE, DISCRETION OF COURT: Great latitude of discretion is allowed to the court in the trial of challenges for cause and where on examination for cause, a juror states in substance, that he has an opinion in favor of the defendant, but in spite of that opinion, he could act upon the evidence and law in the case and the juror was rejected, this court will not interfere with the discretion of the trial court even though the members of this court should be-

lieve from the record that the juror so excluded was competent. — United States v. Alexander, 2 Idaho, 354, 17 Pac. 746.

EXAMINATION FOR CAUSE, NEW TRIAL: Where the record shows that a party was precluded from examining a juror for cause, and no examination of the juror was had, but he was allowed to serve, held, that a substantial right of the party was denied, for which a new trial will be granted.—United States v. Alexander, 2 Idaho, 354, 17 Pac. 746.

Section 3463. Jury to be Sworn: As soon as the jury is completed, an oath must be administered to the jurors in substance, that they and each of them will well and truly try the matter in issue between....., the plaintiff, and....., the defendant, and a true verdict render according to the evidence.

1887 R. S. Sec. 4382.

Oath, administration of: Secs. 4477 to 4481.

JURY TRIAL, ORDER OF PROCEEDINGS, INSTRUCTIONS.

Section 3464. Order of Proceedings on Trial: When the jury has been sworn, the trial must proceed in the following order, unless the judge for special reasons otherwise directs:

1. The plaintiff, after stating the issue and his case, must produce the evidence on his part;

2. The defendant may then open his defense and offer his evidence in support thereof;

3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

4. When the evidence is concluded, unless the case is submitted

to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;

5. If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;

6. The court may then charge the jury.

1887 R. S. Sec. 4383.

PROVISIONS RELATING TO TRIALS.

GENERAL PROVISIONS:

These provisions applicable to trial on appeal from justices' court: Sec. 3689.

Jury trial, proof of and procedure, actions libel and slander: Secs. 3231 and 3232.

Place of trial: Secs. 3179 to 3187.

Judge, qualifications of: Sec. 3029.

Reference, compulsory: Sec. 3488.

Reference by consent: Sec. 3487.

CONTINUANCE AND POSTPONEMENT:

Continuances: Secs. 3457 and 3458.

Juror or judge called as witness, trial may be postponed: Sec. 4407.

PRELIMINARY MATTERS:

Either party may bring on trial: Sec. 3456.

Private trials, in cases of divorce, seduction, etc.: Sec. 3012.

Judgment on pleadings: Note Sec. 3500.

Exceptions: Secs. 3515 et seq.

Court may enlarge the time provided by statute, for the purpose of settling statement, bill of exceptions, etc.: Sec. 3744.

Court may require clerk to take down evidence in absence of stenographer: Sec. 3745.

WITNESSES:

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Judge or juror may be witness, procedure: Sec. 4407.

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Depositions: Secs. 4497-4527.

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THE JURY, INSTRUCTIONS, VERDICT, ETC.:

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Discussion of law addressed to the court: Sec. 4402.

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Verdict: Secs. 3477-3481.

Damages, interest, etc.: Sec. 3204.

Judicial knowledge, as declared by court, jury must accept: Sec. 4403.

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Sec. 3499.

VARIANCE AND AMENDMENTS:

Procedure where variance between pleadings and proof: Sec. 3237 et seq.

Amendments: Sec. 3241.

Papers, defective: Sec. 3739.

Errors and defects not affecting substantial rights, disregarded, judgment not reversed by reason thereof: Sec. 3243.

Pleadings, construction of: Sec. 3223.

OPENING STATEMENT: In making an opening statement to the jury, counsel has no right to state his views of the law of the case. Such opening statement should be confined to pointing out the issues made by the pleadings, and stating the facts which the party expects to prove.—*Giffin et ux. v. City of Lewiston (Idaho)*, 55 Pac. 545.

TRIAL, ORDER OF PROOF, DISCRETION OF COURT: It is a general rule that a defendant should not open

the defense by a cross-examination of plaintiff's witnesses, but the application of this rule must rest largely in the sound discretion of the trial court.—*Hopkins v. Utah Northern Railway Co.* 2 Idaho, 277, 13 Pac. 343.

IRREGULAR ORDER NOT INVALID: The practice of opening a case to permit a party to introduce evidence in chief, after he has closed his case, while a matter of discretion in the trial court, should be discouraged to the extent of requiring the moving party to show good excuse, such as inability to produce before closing, that the evidence was discovered afterwards, or other good reason.—*Giffin et ux. v. City of Lewiston (Idaho)*, 55 Pac. 545.

IMPROPER REMARKS OF COUNSEL: It is not proper for counsel, while arguing a cause to a jury, to question the motives of opposing counsel in objecting to the introduction of evidence, on the ground that it is immaterial, incompetent or irrelevant.—*Giffin et ux. v. City of Lewiston (Idaho)*, 55 Pac. 545.

STATEMENT OF COURT IN PRESENCE OF JURY: Statement of court that a fact is not proven is not prejudicial error when there is no evidence whatever showing the same.—*Coffin et*

al. v. Bradbury et al. (Idaho), 35 Pac. 715.

ORDER OF EVIDENCE: A court has discretionary power to admit testimony out of its order.—*Stephens v. Union Assurance Society*, 16 Utah, 22, 50 Pac. 626, 67 Am. St. Rep. 595.

The refusal of a trial court to reopen a case, after the close of the trial, for the purpose of allowing additional evidence to be introduced, is not an abuse of discretion, where no excuse is shown for not having produced the evidence at the trial.—*Consolidated Nat. Bank v. Steamship Co.* 95 Cal. 1, 30 Pac. 96, 29 Am. St. Rep. 85.

Affirmative rests on plaintiff, in contemplation of law, and he has the right to open and close.—*Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 343.

JURY TRIAL: Counsel have no right to read law books, nor to argue questions of law to the jury.—*Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51. On the argument of a murder trial the district attorney, against objection, was permitted to read extracts from "Browne's Medical Jurisprudence" on the subject of insanity. There was no evidence that it was standard or scientific. Held, error.—*People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70.

Section 3465. Charge to the Jury. Statement of Points of Law Contained: In charging the jury the court may state to them all matters of law which he thinks necessary for their information in giving their verdict; and if it states the testimony of the case it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party at the time, upon request, a statement in writing of the points of law contained in the charge or sign at the time a statement of such points prepared and submitted by the counsel of either party.

1887 R. S. Sec. 4384.

Instruction, judicial knowledge, facts within, declared to jury: Sec. 4403.

APPLICATION OF LAW TO FACTS IN CASE: When the court instructs a jury upon what state of facts they must find a verdict, for or against the party, the instructions should include all the facts in the controversy, material to the rights of the parties, upon the claim of the plaintiff and the defense of the defendant.—*Deasey v. Thurman*, 1 Idaho, 775; see also *Johnson v. Fraser*, 2 Idaho, 371, 18 Pac. 48.

ADMISSIONS OF PLEADINGS: It is error for the court to instruct the jury that it is necessary for the plaintiff to prove facts alleged in the complaint and not denied in the answer. The failure to deny a material allegation contained in a complaint is an admission of it; and the admission is conclusive evidence of the fact admitted.—

Lillienthal & Co. v. Anderson, 1 Idaho, 673.

MUST BE BASED ON PLEADINGS: A party to an action can not avail himself of the benefit of an estoppel, unless he pleads it. It is error for the court to submit such question to the jury by instructions, unless it be pleaded.—*Ieland v. Isenbeck*, 1 Idaho, 469.

SAME, ISSUE NOT RAISED: All the instructions asked being requested upon the assumption that an issue had been raised as to the existence of a water course running through plaintiff's land, and no such issue being raised, it was not error to refuse them.—*Norris v. Glenn*, 1 Idaho, 590.

MUST BE BASED ON EVIDENCE: Instructions asked are properly refused when they are not based upon some evidence material to the controversy, although as abstract principles of law,

they are correct.—*Johnson v. Fraser*, 2 Idaho, 371, 18 Pac. 48.

SAME: The relevancy of instructions is to be determined by the evidence in the case.—*Dangel v. Levy*, 1 Idaho, 722.

ABSTRACT PRINCIPLES NOT GIVEN: Instructions stating abstract principles of law, when there is no evidence in the case to warrant them should not be given.—*Gwin v. Gwin*, (Idaho), 48 Pac. 295.

JURY DETERMINES DISPUTED FACTS: It is error for the court in its instructions to a jury, to assume that material disputed facts have been proven. It is for the jury to find the facts from the evidence.—*Leland v. Isenbeck*, 1 Idaho, 469.

SAME, CONTRIBUTORY NEGLIGENCE: In a suit against a city to recover for a personal injury growing out of a defective sidewalk, the court instructed the jury that, "negligence on the part of the plaintiff resulting in the injury, and without which the injury would not have occurred, would not excuse the city from liability when the city officials had notice of such defect, or could have known of it by the use of reasonable diligence, in time to have prevented it." Held, reversible error, as such instruction took from the jury the defense of contributory negligence under the facts of the case at bar.—*Giffin et ux. v. City of Lewiston* (Idaho), 55 Pac. 545.

SAME, EVIDENCE OF FRAUD: If there is some evidence tending to show fraud, the question whether or not there actually was fraud is to be submitted to the jury.—*Cox v. Northwestern Stage Company*, 1 Idaho, 376.

QUESTIONS OF LAW FOR THE COURT: A purchaser of real estate taking a quit claim deed therefor, not being a bona fide purchaser without notice, it was erroneous for the court, by its instructions, to leave that question to be decided by the jury, from the evidence.—*Leland v. Isenbeck*, 1 Idaho, 469.

SAME, SHIFTING RESPONSIBILITIES OF JURY: It is erroneous to instruct a jury to find a verdict according to the mining customs "if such customs are not contrary to law." It is likewise erroneous to instruct a jury, if they believe the version of the case of one or the other party to be correct, they will find in his favor.—*Ralston v. Plowman*, 1 Idaho, 595.

SAME, DAMAGE NEGLIGENCE: As to the measure of damages, the court, on its own motion, instructed the jury that if they found for the plaintiff they should award him "such damages as they think him entitled to." Held, error; that it gave the jury an arbitrary discretion to assess damages as

caprice, whim, or passion might suggest, regardless of the amount demanded by the complaint, or shown by the evidence. It relieves the jury of every restriction, and authorizes them to grant such damages as they may "think" plaintiff entitled to whether, under all the circumstances of the case, they be just or not.

Prior to giving the instruction above referred to, the court instructed the jury that, if they found for the plaintiff, "such damages may be given as, under the circumstances of the case, may be just," and among other things, in awarding damages, they might take into consideration "the relation proved as existing between plaintiff and deceased, and the injury, if any, sustained by plaintiff in the loss of said deceased child's society." Held, error. The expression "all the circumstances of the case," as used in Section 4100, Rev. St. 1887, means relevant circumstances presented to the jury by evidence under the pleadings. No demand was made in the complaint for damages because of the loss of said infant's society, and no proof was offered showing the social relations existing between plaintiff and said infant.

Under Section 4100, Rev. St. 1887, in this class of cases, certain elements based upon proofs may be taken into consideration; yet, without proof, the jury should not consider them.

Where the court gives inconsistent or contradictory instructions, the judgment will be reversed.—*Holt v. Spokane & P. Ry. Co.* (Idaho), 35 Pac. 39.

MASTER AND SERVANT, UNSAFE PREMISES, FELLOW SERVANTS, INSTRUCTIONS TO JURY: In an action against a mining company for personal injuries, caused by the fall upon the plaintiff of a mass of ore, which it was alleged had not been properly shored up by the shift boss in charge of the gang with which plaintiff was working, whom the defendant claimed to be a fellow servant of the plaintiff, the court charged the jury that it was the duty of the defendant to provide the plaintiff with a reasonably safe place to work in, and that this duty could not be devolved upon an agent. In another part of the charge the court expressly and fully instructed the jury that the carelessness of fellow servants was one of the risks assumed by the plaintiff, and that if the accident could be traced to the negligence of a fellow servant of the plaintiff, the defendant was not liable. Held, that the doctrine applicable to fellow servants was not withdrawn from the jury.

ADMISSIBILITY OF EVIDENCE, DIAGRAM OF PLACE: It is not error to admit, in connection with the testi-

mony of a witness, a diagram of the place where facts testified to by him occurred, which diagram has been made from the witness' directions, and which he swears is correct.

TRIAL IN CIVIL CASES, SEALED VERDICT: In civil cases the court may, in its discretion, without regard to the consent or objection of the parties, authorize the jury to agree upon, seal, and bring in and present to the court a sealed verdict. (In error to Circuit Ct. U. S. for Dist. Ct. Idaho.)—*Bunker Hill & S. Mining & Concentrating Co. v. Schmelling*, 79 Fed. Rep. 263.

SHOULD BE CONCISE: Voluminous instructions tend to mislead and confuse the jury, and should not be given.—*Thatcher v. Quirk* (Idaho), 38 Pac. 652.

CONTRADICTORY INSTRUCTIONS: Contradictory instructions upon a material issue held to be ground for reversal.—*Giffin et ux. v. City of Lewiston* (Idaho), 55 Pac. 545; *Holt v. Spokane & P. Ry. Co.* (Idaho), 35 Pac. 39.

INCONSISTENT INSTRUCTIONS ARE ERRONEOUS: And an erroneous instruction is not cured by another instruction made upon the same subjects which is correct unless the former is specifically withdrawn.—*Lufkins v. Collins*, 2 Idaho, 135, 7 Pac. 95. See also *Mackey v. People*, 2 Colorado; *People v. Campbell*, 30 Cal. 312.

BUT SHOULD BE EXCEPTED TO: Where the law of the case has been correctly given by the court to the jury, and in addition thereto it gives an erroneous instruction, which is not excepted to until after the verdict, is returned, held, that the exception comes too late, and such error is not sufficient to warrant a reversal.—*State v. Scheiler* (Idaho), 37 Pac. 272.

HARMLESS ERROR: A mere misuse of the conjunctive "and" in the place of the disjunctive "or" in a charge which has clearly and repeatedly correctly stated the law, is harmless error, which will not warrant a reversal.—*O'Connor v. Langdon*, 2 Idaho, 803, 26 Pac. 659.

NO WRITTEN INSTRUCTIONS, PRESUMPTION: When written instructions are not given to the jury, this court will presume that the law of the case was correctly given, unless the contrary appears; but when there is a great preponderance in the weight of evidence against the verdict, the appellate court will presume that the jury misconceived either the evidence or the law and will order a new trial.—*Monarch G. & S. M. Co. v. McLaughlin*, 1 Idaho, 617.

APPEAL, DEFECTIVE RECORD, PRESUMPTIONS: Where a refusal to

give an instruction requested by a party is assigned as error, the supreme court will look into the entire charge to determine whether such refusal was prejudicial; and where the records show that the charge was given, which is not brought here for consideration, it will be presumed that the trial court gave all the instructions necessary to assist the jury in arriving at a just and proper verdict.—*Hopkins v. Utah Northern Railway Co.* 2 Idaho, 277, 13 Pac. 343.

EXCEPTIONS TO INSTRUCTIONS: Where instructions are given by the court upon its own motion, they must be excepted to before verdict to be considered in appellate court.—*State v. O'Donald* (Idaho), 39 Pac. 556.

INSTRUCTION, EXCEPTION: An instruction not excepted to is not properly a part of the record, and cannot be reviewed upon an appeal.—*Emery v. Langley*, 1 Idaho, 694.

GENERAL EXCEPTION TO INSTRUCTIONS: Where the court gives a general charge to the jury and the charge contains various propositions of law and a general exception only is taken, such exception is not sufficient.—*Black v. City of Lewiston*, 2 Idaho, 254, 13 Pac. 80.

EXCEPTIONS, RECORD, PRESUMPTION: Where the record shows that all the instructions given were given by the court, and does not show that any were given upon request or suggestion of either party, the presumption is that all the instructions were given by the court upon its own motion and in such case, to entitle exceptions thereto to be heard, the record must show that such exceptions were taken before verdict.—*State v. Hurst* (Idaho), 39 Pac. 554.

EVIDENCE SUFFICIENT TO SUBMIT QUESTION TO JURY: To justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury.—*Janin v. London and S. F. Bank*, 92 Cal. 14, 27 Pac. 1100, 27 Am. St. Rep. 82.

An instruction which merely applies the law to hypothetical facts and submits to the jury the question whether the facts hypothetically stated are true, is not an instruction as to questions of fact.—*Braddeley v. Shea*, 114 Cal. 1, 45 Pac. 990, 55 Am. St. Rep. 56.

Instructions should include all facts in controversy, material to the right of the plaintiff, or the defense of the de-

fendant, where the court instructs the jury upon what state of facts they must find a verdict for a party.—*Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114.

It is the province of the jury to find facts from the evidence, and it is error for the court in its charge to assume as proven a fact which is in issue.—*Caldwell v. Center*, 30 Cal. 539, 89 Am. Dec. 131.

Instruction erroneously assuming a fact in favor of the appellant cannot be complained of by him; nor can the assumption of an undisputed fact in an instruction injure him. Purely abstract instructions which could not have mislead the jury, in view of all the circumstances of the case, will not be reviewed on appeal.—*Hill v. Finnigan*, 77 Cal. 267, 19 Pac. 494, 11 Am. St. Rep. 279.

Instructions should avoid any statement of the evidence which may indicate the conclusions of the judge respecting the facts directly disputed on the trial.—*McShane v. Kenkle*, 18 Mont. 208, 44 Pac. 979, 56 Am. St. Rep. 579.

An instruction impugning improper motives to the defendant, not shown by the evidence, is prejudicial error.—*Moore v. Hopkins*, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248.

QUESTIONS OF FACT AND LAW: In an action for malicious prosecution, the question as to whether or not the facts establish malice is a question of fact for the jury, but whether the defendant had or had not probable cause for instituting the prosecution is always a question of law to be determined by the court, and it is error to submit it to the jury.—*Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174.

Fraud in sale, as against creditors, is question for the court, and not for the jury, where the facts are not disputed, and the law, upon those facts, declares the transaction to be fraudulent.—*Chenery v. Palmer*, 6 Cal. 119, 65 Am. Dec. 493.

NEGLIGENCE, WHEN FOR THE JURY: Negligence is a question of law and fact, and if there is room for difference of opinion between reasonable men as to the existence of facts from which it is proposed to infer negligence, or as to the inferences which might fairly be drawn from conceded facts, the question of negligence is for the jury to determine, and the court should not grant a non-suit.—*Redington v. Pacific Postal Tel. C. Co.* 107 Cal. 347, 40 Pac. 432, 48 Am. St. Rep. 132. Before the question of negligence becomes one of law for the court, the facts shown by the evidence must be such that all reasonable men must draw the same conclusion from them. If the facts proved are such that rea-

sonable men may fairly differ as to whether or not there was negligence, the question is one for the jury to consider. An exception to a charge given by the court to the jury is unavailing on appeal, where any portion of the charge is correct, unless the exception is strictly confined to the objectionable matter, and the judge's attention called thereto, at the time of the delivery of the charge, so as to afford him an opportunity to make a correction.—*Lowe v. Salt Lake City*, 13 Utah 91, 57 Am. St. Rep. 708, 44 Pac. 1050.

NEGLIGENCE, CONTRIBUTORY, WHEN A QUESTION FOR JURY: If a street railway car ran over a pedestrian at a street crossing, and there was a failure to ring the bell as required by a reasonable municipal ordinance, and the night was dark and foggy, the question whether the person injured was guilty of contributory negligence in attempting to cross in front of the car, cannot be decided by the court as a matter of law, but should be submitted to the jury.—*Driscoll v. Market St. Cable Ry. Co.* 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203.

The question of whose negligence was the direct and proximate cause of an accident is one of fact for the jury.—*Thompson v. Salt Lake Rapid Transit Co.* 16 Utah, 281, 52 Pac. 92, 67 Am. St. Rep. 621; *Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138.

FORCIBLE EJECTION FROM RAILROAD CAR: If a boy, sixteen years of age only, leaps from a railroad car while in motion, in obedience to the command of the conductor, accompanied by a show of force, the court cannot say judicially that the act of the boy was voluntary, but should leave it to the jury to say whether, under all the circumstances, the conduct of the conductor did not amount to compulsion.—*Kline v. C. P. R. R. Co.* 37 Cal. 400, 99 Am. Dec. 282.

Whether parents, in permitting their child of tender years to be out of their sight for fifteen or twenty minutes, during which time it went upon a street and was injured by a street car were, under all the circumstances, guilty of a want of ordinary care, is a question for the jury.—118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216.

PROOF TO A MORAL CERTAINTY: When the court instructs the jury that the plaintiff must prove the fault or negligence of the defendant to the satisfaction of the jury by a preponderance of evidence, it is not error to refuse further to instruct them that the plaintiff must make such proof to a moral certainty.—*Treadwell v. Whittier*, 80 Cal. 575, 22 Pac. 266, 13 Am. St. Rep. 175.

FRAUD, PRESUMPTIVE EVIDENCE OF: When fraud is charged, express proof is not required; it may be inferred from strong presumptive circumstances.—*McDaniel v. Baca*, 2 Cal. 326, 56 Am. Dec. 339.

Instruction that malice or gross neglect of plaintiff's rights has not been sufficiently established to allow jury to find exemplary damages, is proper, if such is the state of the evidence.—*Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93.

INSTRUCTIONS, BURDEN OF PROOF: An instruction that "plaintiffs having the burden of proof, they must establish the material allegations of their complaint by a preponderance of evidence," is not erroneous as assuming that either party has established a right to recover.—*Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665.

INSTRUCTIONS, WEIGHT OF EVIDENCE: In a civil case, it is error to instruct the jury that there must be sufficient evidence to "convince their minds" of any fact necessary to be shown. The weight of evidence or preponderance of probability is sufficient to establish a fact in a civil case.—*Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365.

ORAL ADMISSIONS: A court should not instruct a jury that evidence of the oral admissions of a party should be received with caution, when it is the only kind of evidence which in the nature of the case his adversary could procure.—*Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87.

INSTRUCTIONS MINGLING TWO CAUSES OF ACTION: If, in an action to recover for injuries received from the defendant's bull, the court instructs the

jury in one instruction that the defendant is liable for injuries resulting from the negligence of the defendant's employees in the performance of a given duty, and in another, that before plaintiff can recover, he must establish the fact that the bull at the time he inflicted the injury was vicious, and that the defendant had knowledge of such viciousness, will not be regarded as prejudicial or erroneous, if the complaint, though in one count, charges the defendant with negligence and also with keeping a bull known to him to be vicious and dangerous, and alleges injuries resulting to the plaintiff.—*Clowdis v. Fresno Irrigation and Flume Co.* 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238.

FORGED DEED, CONFLICTING INSTRUCTIONS: Where defendant in ejectment claims under a deed alleged to be forged, and pleads the statute of limitations, conflicting instructions as to the time when the statute began to run are grounds for reversal.—*Haight v. Vallet*, 89 Cal. 245, 26 Pac. 897, 23 Am. St. Rep. 465.

INSTRUCTIONS, GENERAL EXCEPTIONS: A general exception to each and all of the instructions given by the court of its own motion is not sufficient to authorize a review of the instructions so given.

EXCEPTIONS TO SPECIAL INSTRUCTIONS: The rule that a general objection to instructions as not sufficient has no application to special instructions asked by the parties, and given or refused by the court, concerning which a general exception is sufficient.—*Cavallaro v. Texas, Etc. Ry. Co.* 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94.

Section 3466. Special Instructions: Where either party asks special instructions to be given to the jury, the court must either give instructions, as requested, or refuse to do so, or give the instructions with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.

1887 R. S. Sec. 4385.

MUST BE BASED ON EVIDENCE: It is not error to refuse an instruction which is foreign to the pleadings and evidence, although correct in principle.—*Henry v. Jones*, 1 Idaho, 48.

INSTRUCTIONS, UNLESS CORRECT UNDER ALL THE FACTS, ARE PROPERLY REFUSED: As "that where one of two innocent parties must suffer, that party who had been the cause of another's loss must lose." And "that a man claiming to own land is bound to know the state of his own title."—*Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157.

Introduction of proof by plaintiff at trial, in support of material averments in his complaint, which were so defectively denied that, upon motion, such denials might have been stricken out as sham and irrelevant, is a waiver of all objections to the sufficiency of said denials; and an instruction to the jury, asked by the plaintiff, to the effect that the facts so averred were admitted to be true for all the purposes of the trial, may properly be refused.—*Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

Exceptions to the charge of the court should point out the specific portions of

the charge excepted to, and should be jury retires.—Hicks v. Coleman, 25 Cal. made at the time of the trial, before the 122, 85 Am. Dec. 103.

Section 3467. View by Jury of Premises: When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred; it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

1887 R. S. Sec. 4386.

Section 3468. Admonition When Jury Permitted to Separate: If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them; *Provided, however,* That in all actions involving the title or right to possession of mines or mining claims, or for damages thereto, if any party to such action shall so request, the court shall not permit the jury to separate during the trial, and in such case, the court shall not disclose to the jury which party made such request, and no comment shall be made thereon by either party to the action.

1901, 6th Ses. p. 216.

Section 3469. Jury May Take with Them Certain Papers: Upon retiring for deliberation the jury may take with them all papers which have been received as evidence in the cause, except depositions, or copies of such papers as ought not in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person

1887 R. S. Sec. 4388.

DELIBERATION OF JURY.

Section 3470. Deliberation of Jury, how Conducted: When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they must be kept together, in some convenient place, under charge of an officer, until they agree upon a verdict or are discharged by the court. Unless by order of the court the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they are agreed upon their verdict; and he must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

1887 R. S. Sec. 4389.

Section 3471. May Come into Court for Further Instructions: After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel.

1887 R. S. Sec. 4390.

Further instructions to jury, and re-

ception of verdict, on Sunday or holidays: Sec. 3017.

Section 3472. Proceedings in Case a Juror Becomes Sick: If, after the impaneling of the jury, and before verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards impaneled.

1887 R. S. Sec. 4391.

Section 3473. When Prevented From Giving Verdict, Cause May be Retried: In all cases where the jury are discharged or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.

1887 R. S. Sec. 4392.

Section 3474. Proceedings While Jury are Absent. Sealed Verdict. Final Adjournment: While the jury are absent the court may adjourn from time to time, in respect to other business but it is nevertheless open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess or adjournment for the day. A final adjournment of the court for the term discharges the jury.

1887 R. S. Sec. 4393.

DISCHARGING JURY FOR FAILING TO AGREE, DISCRETION OF COURT: The discharge of a jury by reason of their inability to agree, is entirely within the sound discretion of the court.—*State v. Jorgenson* (Idaho), 32 Pac. 1129.

SAME, PRESUMPTION, APPEAL: The supreme court will not reverse a

judgment of the court below for an abuse of discretion in discharging the jury, unless it is affirmatively shown by the record that there has been such abuse of discretion. Without such affirmative showing, the presumption of this court is that the jury was properly and legally discharged.—*State v. Jorgenson* (Idaho), 32 Pac. 1127.

VERDICT.

Section 3475. Verdict, how Declared, form of, Polling Jury: When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. If more than

three jurors disagree, they must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict. If more than three answer in the negative, the jury must again be sent out.

1887 R. S. Sec. 4394.

Court may receive verdict on Sunday or holidays: Sec. 3017.

The accidental absence of counsel when the verdict is received, if not due to any action on the part of the court,

or of the opposing counsel or parties is not ground for the reversal of the judgment. — *Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665.

Section 3476. Proceedings when Verdict is Informal:

When the verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

1887 R. S. Sec. 4395.

Section 3477. General and Special Verdict Defined:

The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law.

1887 R. S. Sec. 4396.

EJECTMENT: Where plaintiff's right terminates pending the action: Sec. 3381.

Improvements, claim for: Sec. 3382.

Several judgment, for or against, some parties: Secs. 3496 and 3497.

Misconduct of jury: Sec. 3524.

WHEN VERDICT WILL NOT BE SET ASIDE: Where the material issues are fairly submitted to the jury by proper instructions, the verdict of the jury, or the order of a court overruling a motion for a new trial, will not be set aside by the appellate court, on the ground of the insufficiency of the evidence to justify the verdict, where the evidence in such issues is conflicting, and no exceptions taken by appellants to the instructions given.—*Coffin et al. v. Bradbury* (Idaho), 35 Pac. 715.

Verdict will not be set aside as contrary to the evidence, when there are several distinct defenses, each of which is sufficient to defeat the action, and the verdict is general and supported by the evidence as to one of the defenses,

though not so as to all the others. Verdict found on any fact or title, distinctly put in issue, is conclusive in another action between the same parties or their privies in respect of the same fact or title; but it is not sufficient that such fact or title be merely put in issue, but it must be tried by the jury and constitute the foundation of the verdict. It must be relevant and material, and if not specially found, must at least have been necessarily passed upon by the jury.—*Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472.

VERDICT, EJECTMENT: Ouster is not found either in etrms or by legal conclusions, by a special verdict, in an action of ejectment brought by a tenant in common against a co-tenant who is in the occupancy of the land held in common, that the plaintiff demanded of his co-tenant to be let into the immediate possession of the same, and that the co-tenant refused.—*Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135.

Section 3478. When General or Special Verdict May be Rendered: In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may

direct a jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon.

The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

1887 R. S. Sec. 4397.

Submitting special issues in equity causes: Sec. 3454.

DISCRETION OF JURY: In an action for the recovery of money only, it is within the discretion of the jury to find a general or special verdict.—Rev. St. Idaho, Section 4397; *Shaw Lumber Co. v. Manville* (Idaho), 39 Pac. 559.

DISCRETION OF COURT: The submission of interrogatories to the jury for the purpose of obtaining a special verdict is largely a matter of discretion; and it is not an abuse of such discretion to refuse to submit such interrogatories in a cause when the issues are not complicated.—*Giffin et ux. v. City of Lewiston* (Idaho), 55 Pac. 545.

SAME: Under Code Section 385 making it a province of the court to determine as to what particular fact the jury shall find specially, error can not be predicated on the action of the court not refusing to direct the jury to find specially on certain issues.—*Luckins v. Collins*, 2 Idaho, 234, 10 Pac. 300.

CONTRARY WHEN ISSUES COMPLICATED: Under Rev. St. 1887, Section 4397, providing that "the court may direct the jury to find a special verdict in writing upon all or any of the issues," it is the duty of the court to submit special issues at the request of the parties when the issues are of a complicated nature; and a refusal to do so is reversible error.—*Burke et al. v. McDonald et al.* 2 Idaho, 646, 33 Pac. 49.

INCONSISTENT FINDING, JUDGMENT: Under Code, Section 385, providing that where special findings of fact are inconsistent with the general verdict, the former control the latter, error can not be predicated on the ground of the court not rendering judgment in accordance with the special

findings, it appearing that such findings were inconsistent with the general verdict. — *Bradbury v. Idaho & O. Land Co.* 2 Idaho, 221, 10 Pac. 620.

SAME, NEW TRIAL: When the special findings of facts made by a jury is inconsistent with the general verdict, the former controls.

When the special facts found by the jury are contradictory or inconsistent upon a material issue, a new trial must be granted.

As to whether the special findings are contradictory or inconsistent, the true test is whether they would warrant a different judgment from the one entered.—*Gwin v. Gwin* (Idaho), 48 Pac. 295.

FINDINGS HELD SUFFICIENT: Held, that the special findings of the jury were within the issues made by the pleadings, and sufficient to sustain the judgment.—*Gross, Road Overseer v. McNutt* (Idaho), 38 Pac. 935.

The record in this case, examined and found fully to sustain the findings of the jury and judgment of the court. Rehearing denied.—*Nasholds v. McDonell* (Idaho), 55 Pac. 894.

WITHDRAWING SPECIAL ISSUES. No error is committed by withdrawing special issues from jury and receiving general verdict, if counsel on both sides consent to it, where the jury announce that they can not agree upon the special issues submitted to them, but can agree upon a general verdict.—*Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151.

In ejectment, plaintiff may sue one or more defendants, who may answer separately, or demand separate verdicts; but unless they do so, they will be concluded by the general verdict.—*Winans v. Christy*, 4 Cal. 70, 60 Am. Dec. 597.

Section 3479. Verdict, Actions for Recovery of Money; Counterclaim: When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counter claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery.

1887 R. S. Sec. 4398.

AMOUNT ADMITTED BY PLEADING: The omission of the jury to find

by their verdict the amount due when that question is not in controversy, does not deprive the prevailing party of

his right to a judgment for the sum admitted to be due him by the pleadings.—*Betts v. Butler*, 1 Idaho, 185.

SLANDER, DAMAGES: Where the slanderous words, charged in an action for slander, were spoken wanonly and

maliciously, the plaintiff is entitled to recover punitive or exemplary damages, and the assessment thereof is almost entirely in the discretion of the jury.—*Cahill v. Murphy*, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88.

Section 3480. Verdict in Actions for Specific Personal Property: In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or, if being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and if so instructed, the value of specific portions thereof, and may at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

1887 R. S. Sec. 4399.

REPLEVIN, PRACTICE, GENERAL VERDICT: In an action of claim and delivery, a general verdict finding for or against either party is sufficient to enable the court to enter judgment thereon for the return of the property when such a return is an appropriate remedy.

SPECIAL FINDINGS OF VALUE: In such actions where several articles are sought to be recovered, if either party desire the findings of value of each article, he should request that such finding be made or he can not take advantage for the failure to do so.

SPECIAL FINDINGS AS TO RETURN OF PROPERTY: In such cases

if either party desire a finding for the return of property, he should request such finding, and if he fail to do so, he can not take advantage of the failure to make such finding.—*Johnson v. Fraser*, 2 Idaho, 371, 18 Pac. 48.

FORM OF VERDICT, CLAIM AND DELIVERY: A verdict stating that the jury find for the defendants and fix the value of the property at fifteen hundred dollars is sufficient to support a judgment in favor of the defendant for the return of the property to him, or for the value thereof in case the delivery can not be had.—*Etchepare v. Aguirre*, 91 Cal. 288, 27 Pac. 668, 25 Am. St. Rep. 180.

Section 3481. Entry of Verdict: Upon receiving a verdict, an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and setting out the verdict at length; and where special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

1887 R. S. Sec. 4400.

Verdict, mandamus proceedings, transmitting to court where petitioned for: Sec. 3777.

Party claiming costs must file memorandum within five days after verdict or decision of jury, court or referee: Sec. 3731.

VERDICT, SUFFICIENCY OF EVIDENCE: If there is sufficient conflict in the evidence to put the determination of the issue within the province of the jury, the verdict can not be disturbed on appeal on the ground of the

insufficiency of the evidence to sustain it.

An excessive verdict based on erroneous instructions that the case is one in which punitive or vindictive damages may be awarded must be set aside on appeal.—*Warner v. Southern Pacific Co.* 113 Cal. 105, 45 Pac. 187, 54 Am. St. Rep. 327.

The court will set aside a verdict where the damages are unjustifiable.—*McDaniel v. Baca*, 2 Cal. 326, 56 Am. Dec. 339.

TRIAL BY THE COURT.

Section 3482. Trial by Jury, when and how Waived:

Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or, for the recovery of specific real or personal property, with or without damages, and with the assent of the court, in other actions, in manner following:

1. By failing to appear at the trial;
2. By written consent, in person, or by attorney, filed by the clerk;
3. By oral consent, in open court entered in the minutes.

1887 R. S. Sec. 4405.

Submitting special issues to jury:
Sec. 3454.

EQUITABLE ACTIONS: No action purely equitable in character can proceed to a decree upon the verdict of a jury as the foundation thereof; but if a jury is called in such a case, it must be to avoid the court in determining questions of fact, which, when found, are the findings of the court; and the decree must be the result of the judgment of the court, or the judge thereof.—*Ramsay v. Hart*, 1 Idaho, 423.

Verdict of jury in suit in equity is advisory merely.—*Sullivan v. Boyer*, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51.

Special issues only should be submitted to a jury which has been called to assist in the trial of an equity case.

Therefore, a judgment based upon a general verdict in such an action is erroneous.—*Hulley v. Chedic*, 22 Nev. 127, 36 Pac. 783, 58 Am. St. Rep. 729.

The refusal to give instructions to the jury in an equity case is not a cause of reversal if the court itself finds upon all the issues.—*Riley v. Martinelli*, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209.

Record in case involving questions both of law and of equity which is tried without a jury should show that the equitable issues were first disposed of, if that course was followed; or if the whole action and all the issues were tried and submitted together, that fact should appear.—*Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365.

Section 3483. Decision of Court on Question of Fact:

Upon a trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within twenty days after the cause is submitted for decision.

1887 R. S. Sec. 4406.

Judgment can not be attacked in collateral action on the ground that it is not supported by the findings.—*Johnson v. San Francisco Savings Union*, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129.

PRACTICE IN CHANCERY: The relief which may be granted in a suit in chancery must be restricted to the issues formed by the pleadings. Hence if the suit is to restrain the prosecution, by defendant, of actions of ejectment or for specific performance, and if that is refused, for the allowance of the value of complainant's improvements on the property, the court can not, in the absence of affirmative pleadings on

behalf of the defendant, decree, after the cause has been submitted for decision, that the defendant be allowed to file a cross-bill, and upon the filing of such cross-bill on the same day, enter a decree against complainant for the possession of the property, and for a sum specified for the use, enjoyment, rents, and profits thereof.—*Metcalf v. Hart*, 3 Wyo. 513, 27 Pac. 900 and 31 Pac. 407, 31 Am. St. Rep. 122 and note.

Findings may be filed nunc pro tunc.—*Fox v. Hale & Norcross S. M. Co.* 108 Cal. 478, 41 Pac. 328.

Findings are not required in proceedings in aid of execution.—*Lyons v. Marcher*, 119 Cal. 382, 51 Pac. 559.

Section 3484. Facts and Conclusions of Law Separately Stated, Judgment on: In giving a decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.

1887 R. S. Sec. 4407.

CONCLUSIONS, FINDINGS: Decisions of court under Section 4407 Rev. St. Idaho should contain only the ultimate facts found and the conclusions of law applicable to the facts.—*Hamil-*

ton v. Spokane & P. Ry. Co. 2 Idaho, 898, 28 Pac. 408.

ABSENCE OF FINDINGS, PRESUMPTION: IN the absence of findings of fact from the record in a cause tried by the court, without a jury, the

presumption is that they were waived. If not that fact should appear affirmatively.—*Spier v. Lowenberg*, 1 Idaho, 785.

MUST BE RESPONSIVE TO ISSUE: The findings of fact must respond to all the material issues.—*Wilson v. Wilson* (Idaho), 57 Pac. 708.

CONCLUSIVE IF RESPONSIVE TO ISSUE: The findings of the court should be responsive to the allegations in the pleadings and the finding upon such allegation is conclusive as to which item in evidence offered sustains it.—*Broadbent v. Brumback*, 2 Idaho, 336, 16 Pac. 555.

APPEAL, AFFIRMANCE: Where the findings are responsive to all the material issues raised by the pleadings and are warranted by the testimony and they support the judgment and no error of law appearing, the judgment will be affirmed.—*Cooper v. Kellogg*, 2 Idaho, 304, 13 Pac. 350.

TRIAL BY THE COURT, FAILURE TO FIND, EFFECT: If, in an action of fraud, the findings of the court are sufficient to sustain the judgment, the fact that the court fails to find upon certain allegations in the complaint which, if found true or not true, would not affect the result, is no cause for a new trial.

FINDINGS, WHEN RESPONSIVE TO ISSUE: In such actions, findings showing the situation of the parties and the circumstances under which the alleged fraud was committed are responsive to the issues and not objectionable as being outside thereof.—*Tage v. Alberts*, 2 Idaho, 249, 13 Pac. 19.

QUESTIONS IN ISSUE: On a judgment for plaintiff; held, that all questions put in issue and not found upon by the district court would have been found against the defendant, but were deemed immaterial.—*Gamble v. Dunwell*, 1 Idaho, 268.

FINDING OF FACTS, WHEN RESPONSIVE TO ISSUE: Where in an action to set aside the sale of a mine for alleged fraud of defendant, purchaser concealing the value of the mine, an issue was whether or not defendant, before the sale, had discovered a large and valuable vein or body of ore in the claim, a finding that the evidence did not show that defendant had discovered or knew of the existence of any vein or body of ore, is sufficiently responsive.—*Synnot v. Shaughnessy*, 2 Idaho, 111, 7 Pac. 82.

FINDINGS OF FACT, WHEN RESPONSIVE TO ISSUES: Where complaint alleges that defendants wrongfully and unlawfully cut and injured the ditch and dam of plaintiff, the finding that defendants' washed out the

dam and filled up the ditch to such an extent as to prevent its use for a year, is sufficiently responsive to the issue.—*Riborado v. Quang Pang Mining Co.* 2 Idaho, 131, 6 Pac. 125.

APPEAL, REVERSAL, UNCERTAINTY OF FINDINGS: Where the findings of fact are not responsive to the material issues, and are so uncertain that they would not warrant a judgment thereon, the case should be reversed.—*Bowman v. Ayers*, 2 Idaho, 282, 13 Pac. 346.

CONFLICT OF EVIDENCE: Where there is a substantial conflict in the evidence, a finding of fact by the court based thereon will not be disturbed.—*Spaulding v. Coeur d'Alene Ry. & Nav. Co.* (Idaho), 51 Pac. 408.

WHEN OMISSION, HARMLESS ERROR: The court found that a certain contract was entered into by the parties, but omitted to find that certain specifications referred to in said contract, and made a part thereof, were a part of the said contract. Held, under the facts of this case, that such omission was harmless error.—*Spaulding v. Coeur d'Alene Ry. & Nav. Co.* (Idaho), 51 Pac. 408.

ADMISSIONS, FAILURE TO DENY ALLEGATIONS: An allegation in the complaint not denied in the answer is sufficient to sustain the finding that the facts stated therein are true.—*Broadbent v. Brumback*, 2 Idaho, 336, 16 Pac. 555.

SAME, JUDGMENT ON APPEAL: If the allegations of a complaint are not denied by the defendant the plaintiff is entitled to a judgment on the pleadings, without any proof on his part.—*Alvord et al. v. United States*, 1 Idaho, 585.

FINDINGS HELD SUFFICIENT: Findings sufficient to sustain judgment.—*Conant et al. v. Jones* (Idaho), 32 Pac. 250.

The finding of the lower court against the claim of appellants for damages held to be sustained by the evidence.—*Branstetter et al. v. Williams et al.* (Idaho), 57 Pac. 433.

FINDINGS HELD UNSUPPORTED: Evidence examined, and held not sufficient to support the findings of fact.—*Idaho Gold Min. Co. v. Union Min. & Milling Co.* (Idaho), 47 Pac. 95.

TRIAL BY THE COURT, AMENDMENT OF ORDER DIRECTING ENTRY OF JUDGMENT: It is not error for the court to amend its conclusions of law after they are filed and before entering judgment, or to vacate an order directing judgment to be entered for a certain amount and thereafter render judgment for a different amount where the findings of fact war-

rant it.—*Curtis v. Walling*, 2 Idaho, 383, 18 Pac. 54.

APPEAL, REVIEW, DEFECTIVE RECORD: Where the record on appeal does not contain the evidence adduced in the trial court, an objection that the finding of fact is not supported by the evidence, will not be sustained.—*Toulouse v. Burkett*, 2 Idaho, 170, 10 Pac. 26.

FINDINGS, DEFAULT JUDGMENT: Where a judgment is entered by default after the publication of a summons, there is no necessity for findings, and, if any are made, they constitute no part of the judgment roll, and the facts of the controversy must in the appellate court be sought in the complaint and the judgment only.—*Murray v. Murray*, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97.

JURY TRIAL: In a suit in equity, where there is a finding of facts by a jury and also by the court, the latter is as conclusive as if no jury had been impaneled in the case.—*Harris v. Lloyd*, 11 Mont. 390, 28 Pac. 736, 28 Am. St. Rep. 475.

FINDINGS IMPLIED, AND MAY BE EXCEPTED TO, WHEN: Where findings are waived, and no express findings are therefore found in the record, such findings on all matters of fact in issue as are necessary to support the judgment of the court in favor of the successful party are implied, and if the evidence is insufficient to justify the court in finding any material or necessary fact, such implied finding of fact may be excepted to in the same manner and with the same effect as if it were an express finding.—*Blanc v. Paymaster Mining Co.* 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149.

A party requiring a finding upon a particular point should specify the point without dictating the terms of the finding.—*Miller v. Steen*, 30 Cal. 402, 89 Am. Dec. 124.

A finding that plaintiff did not rescind a sale is a finding of fact and not a conclusion of law, and all other findings of fact in the case become unnecessary if the plaintiff's right of recovery is based upon his claim that he had rescinded a sale of the property which he sought to recover in the action.—*Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57.

Where in an action by a vendee to rescind a contract for the purchase of land on the ground of mistakes of fact, the answer alleges that such mistakes were the result of the negligence of the vendee, and sets out the facts, a finding by the court that "these mistakes were caused by the neglect of a legal duty on the part of the plaintiff," is a conclusion of law, and not a finding

of fact, and in the absence of other findings, entitles the vendee to a reversal of the judgment against him.—*Goodrich v. Lathrop*, 94 Cal. 56, 29 Pac. 329, 28 Am. St. Rep. 91.

A finding should be of the ultimate facts, but a finding consisting of a recital of the evidence will not be disregarded when record does not show any objections taken thereto.—*O'Connor v. Morse*, 112 Cal. 31, 44 Pac. 305, 53 Am. St. Rep. 155.

Where the court finds generally in favor of the dedication of a street from the acts, facts, and matters before specifically found, and expressly and entirely as a conclusion therefrom, but the specific facts so found do not support such general conclusion, the judgment should be reversed.—*People v. Reed*, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22.

It is not error for a court to fail to make findings of fact on immaterial issues raised by the pleadings, nor on material issues where they, if found, must necessarily have been found adverse to appellant, and when those already found were sufficient to support the judgment.—*Maynard v. Locomotive Engineers' Etc. Ass'n.* 16 Utah, 145, 51 Pac. 259, 67 Am. St. Rep. 602.

If a court declines to find upon certain issues, on the ground that they are not material, the appellate court will presume that evidence was offered thereupon, and will reverse the judgment if, in its opinion, the issues were material.—*Spect v. Spect*, 88 Cal. 437, 26 Pac. 203, 22 Am. St. Rep. 314.

POWER TO CHANGE CONCLUSIONS OF LAW BEFORE ENTRY OF JUDGMENT: The judge of the court, or his successor in office, may, at any time before the entry of judgment, change his conclusions of law upon the facts found; and in an action on the judgment it will be conclusively assumed that the judgment as entered was made after notice, and upon a proper showing.—*Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491.

After trial by the court, when it has filed its findings and rendered judgment, it is irregular for it, upon motion of one of the parties, to re-examine the evidence and reverse its former action, or substitute different findings of facts. The only regular practice for the court to review its former action is on a motion for a new trial.—*Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427.

Judgment will not be reversed for want of findings of fact not excepted to in the trial court.—*McClusky v. Gerhauser*, 2 Nev. 47, 90 Am. Dec. 512.

Judgment is not rendered void in any

case by the mere absence of findings; and in case of default findings are not necessary, and form no part of the judgment roll.—*Estate of Cook*, 77 Cal. 220, 17 Pac. 923, and 19 Pac. 431, 11 Am. St. Rep. 267.

When there are no findings of fact in case, it must be presumed on appeal that all the issues of fact raised by the answer were found in favor of the party recovering judgment.—*Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90; *Lount v. Lount*, 1 Ariz. 422, 25 Pac. 798.

A finding of facts can not be disregarded on appeal simply because it was filed subsequently to the rendering of the decision of the court, when, under the statute, the time and order of filing the finding of facts and entry of judgment are merely directory. The opinion of the court in deciding the case, setting forth its reasons for the judgment, is not a finding of facts within the meaning of such statute.—*Victor, Etc. Mining Co. v. National Bank*, 18 Utah, 87, 72 Am. St. Rep. 767, 55 Pac. 72.

Section 3485. Findings May be Waived, How: Findings of fact may be waived by the several parties to an issue of fact:

1. By failing to appear at the trial;
2. By consent in writing, filed with the clerk;
3. By oral consent in open court, entered in the minutes.

1887 R. S. Sec. 4408.

FINDINGS PRESUMED WAIVED:

When the record fails to show affirmatively that findings of fact were not waived, the presumption is that they were waived.—*Parker v. Beagle*, 40 Pac. 61. (See cases cited.)

FINDING BY COURT: In the absence of any showing to the contrary, it will be presumed that the trial court made all the necessary findings of fact, or that such findings were waived.—*Bunnell & Eno Inv. Co. v. Curtis* (Idaho), 51 Pac. 767.

Section 3486. Proceedings After Determination of Issue of Law: On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of Section 3501 upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account, or the proof of any fact, be necessary to enable the court to complete the judgment, a reference may be ordered, as in that Section provided.

1887 R. S. Sec. 4409.

JUDGMENT ON PLEADING: A judgment on pleading is not a non-suit, but held inferentially to be a judgment

on merits under provisions of Section 4355.—*Johnson v. Manning*, 2 Idaho, 1073-1075, 29 Pac. 101.

REFERENCES AND TRIALS BY REFEREES.

Section 3487. Reference Ordered Upon Agreement of Parties: A reference may be ordered upon the agreement of the parties filed with the clerk, or entered in the minutes:

1. To try any or all the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon;
2. To ascertain a fact necessary to enable the court to determine an action or proceeding.

1887 R. S. Sec. 4414.

Referees' fees: Sec. 3726.

STRICT COMPLIANCE WITH ORDER REQUIRED: Where a referee is appointed under subdivision 1 of this section, and ordered to examine all evidence theretofore taken and reported in a cause, and report all issues, both of law and fact, and report a judgment therein, subject to the approval of the

court, and the referee makes his report, and fails to find upon all issues of fact, the court may remand the cause to the referee, to bring in amended findings of fact covering all issues made by the pleadings, without any further consent of the parties. The court has authority and jurisdiction to require a strict compliance with the order of reference.—*Robinson v. Nelson* (Idaho), 43 Pac. 64.

Section 3488. Reference Ordered on Motion, in what Cases: When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue or report upon any specific question of fact involved therein;
2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;
3. When a question of fact other than upon the pleadings, arises upon motion or otherwise, in any stage of the action;
4. When it is necessary for the information of the court in a special proceeding.

1887 R. S. Sec. 4415.

Reference, order on stipulation, claims against estates, probate judge approving in district court: Secs. 4147-4148.

Reference, facts not put in issue by pleadings: Sec. 3114.

Reference on proceedings supplementary to execution: Sec. 3562.

Referees, commissioners in nature of, to assess damages for right of way for mine: Sec. 3863.

Referees may be ordered to assess damages, mandamus proceedings: Sec. 3779.

REFEREE'S ORDER: The only order under which a referee can act is the one duly made and entered of record before he enters upon his duties; to that he must look for his authority, and he can not go beyond it.—Taylor v. Peterson, 1 Idaho, 513.

AMENDMENTS: An order appointing a referee may not be amended against objections, after such referee has acted, so as to make valid acts not authorized by the original order appointing him and prescribing his duties. (Whitson dissenting.)—Taylor v. Peterson, 1 Idaho, 513.

The court has no power to send ordinary action at law to a referee for trial, against the objection of either party, whether the action requires the examination of a long account, or not. The statute authorizing reference of cases is solely applicable to proceedings in equity.—Grim v. Norris, 19 Cal. 140, 79 Am. Dec. 206 and note. But if an exception is not reserved to such order the error can not be urged as a ground for reversal in the supreme court.—Hendy Machine W. v. Pac. C. C. Co. 99 Cal. 421, 33 Pac. 1084.

Section 3489. Number of Referees, Qualifications, Etc.: A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection.

1887 R. S. Sec. 4416.

All must meet, but two may act: Sec. 3747.

Referees, fees of. Stipulation by parties as to rate of compensation: Sec. 3726.

Section 3490. Either Party May Object: Either party may object to the appointment of any person as referee, on one or more of the following grounds:

1. A want of any of the qualifications prescribed by statute to render a person competent as a juror;
2. Consanguinity or affinity within the third degree to either party;
3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party,

or being a member of the family of either party; or a partner in business with either party; or being security on any bond or obligation for either party;

4. Having served as a juror or been a witness on any trial between the parties for the same cause of action;

5. Interest on the part of such person in the event of the action, or in the main question involved in the action;

6. Having formed or expressed an unqualified opinion or belief as to the merits of the action;

7. The existence of a state of mind in such person evincing enmity against or bias to either party.

1887 R. S. Sec. 4417.

For competency and grounds of chal-

For qualification of jurors: Sec. 3049. lence for cause: Sec. 3461.

Section 3491. Objections, how Disposed of: The objections taken to the appointment of any person as referee must be heard and disposed of by the court. Affidavits may be read and witnesses examined as to such objections.

1887 R. S. Sec. 4418.

Section 3492. Referees to Report Within Twenty Days: The referees must report their findings in writing to the court within twenty days after the testimony is closed; and the facts found and conclusions of law must be separately stated therein.

1887 R. S. Sec. 4419.

Findings, effect of: Sec. 3494.

Exceptions taken before referee are settled before him, proceedings on: Sec. 3519.

REQUIREMENT DIRECTORY: Requirement that referees must file report within twenty days after the close of the testimony in the case is directory.—*Montandon v. Walker*, 2 Idaho, 152, 9 Pac. 608.

Section 3493 Effect of Referee's Finding: The finding of a referee upon the whole issue must stand as the finding of the court, and upon filing the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court.

1887 R. S. Sec. 4420.

FINDINGS OF REFEREE, SETTING ASIDE: Where a cause has been submitted by agreement of parties, and an order of the court to a referee to hear the testimony, and report his findings of fact thereon, it is error for the court, upon its own motion, to set aside such findings, make findings of fact of its own and enter judgment thereon.—*Walker v. Campbell*, 2 Idaho, 757, 26 Pac. 123.

Referee has no power to review the action of the court upon an order of reference deciding the principles upon

which an account should be taken and settled; his duty is to take the account in pursuance of the principles thus settled.

Errors occurring in determining principles upon which account should be taken can not be reviewed by the appellate court, on an application for a new trial, on the ground that the referee adopted and applied those principles in the adjustment of the accounts, but can only be corrected in a direct proceeding for that purpose.—*Smith v. Walker*, 38 Cal. 385, 99 Am. Dec. 415.

Section 3494. How Excepted to, Etc.: The findings of the referee may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the finding reported has the effect of a special verdict.

1887 R. S. Sec. 4421.

CHAPTER CXLVI.

JUDGMENT IN CIVIL ACTIONS.

Section.

JUDGMENT IN GENERAL.

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JUDGMENT IN GENERAL.

Section 3495. Judgment Defined: A judgment is the final determination of the rights of the parties in an action or proceedings.

1887 R. S. Sec. 4350.

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Judgment, when receiver appointed to carry into effect: Sec. 3318.

Judgment, eminent domain, annulling for non-payment of damages assessed: Sec. 3854 et seq.

Judgment against county, how paid: See Sec. 1570, Political Code.

DEFINITION: Judgment is a general term for adjudications of a court and, in its broadest sense, includes decrees.—*Forsythe v. Richardson*, 1 Idaho, 459.

CERTAINTY OF JUDGMENT: A judgment to be valid must be certain and conclusive as to the subject matter and parties to action, and must be capable of execution.—*Alexander v. Leeland*, 1 Idaho, 425.

CONSTRUCTION OF JUDGMENTS: In passing upon the meaning and effect of their judgments, courts sometimes look behind them to see upon what they are founded, and the intention of courts is to be deduced from every part of the judgment and the proceedings leading thereto; and when the intention is accurately ascertained, it will always prevail over mere words. Hence, although the word "reverse" is used in a judgment of the appellate court, yet if it can be ascertained from

its whole scope, that it was only the intention to modify and not vacate the judgment of the court below, it will be considered as an affirmance of such judgment as modified.—*Moore v. Taylor*, 1 Idaho, 630.

CONCLUSIVENESS OF JUDGMENT: The judgment of a court of competent jurisdiction, 'so long as the same is unreserved, is conclusive of all questions involved in the issues presented by the pleadings, and passed upon by the judgment of such court, as to parties and privies.—*Elliott v. Porter* (Idaho), 59 Pac. 360.

IMPEACHMENT, FRAUD: A judgment can only be impeached in equity for fraud in its concoction, and in no case for mere irregularity.—*Hazard v. Cole*, 1 Idaho, 276.

AMENDMENT, POWER OF COURT DURING TERM: Courts have full power during the term to alter, revise, revoke, annul or amend their judgments and all other proceedings, and the rights of the parties can not be considered as fully settled until the judgments pass beyond the control of the court.—*Moore v. Taylor*, 1 Idaho, 630; see also *Curtis v. Walling*, 2 Idaho, 383, 18 Pac. 54.

VOIDABLE JUDGMENT: A purchaser at a sheriff's sale under an execution upon a judgment which is voidable only, acquires a good title.—*Hazard v. Cole*, 1 Idaho, 276.

BILL TO ENFORCE DECREE: Where a decree has been entered, settling and adjusting the rights of various parties to the waters of a stream, and enjoining the use or appropriation of said waters otherwise than as provided in such decree, the remedy for a violation of the provisions of such decree, where neither a change of parties, conditions, or interests appears, is not by bill to enforce the decree.—*Raft River, Land & Cattle Co. v. Langford* (Idaho), 46 Pac. 1024.

DISMISSAL OF APPEAL, RECORD, FINAL JUDGMENT: Where the record on appeal fails to show a final order or judgment from which an appeal could be taken, the appeal will be dismissed.—*Adams v. McPherson*, 2 Idaho, 855, 27 Pac. 577.

JUDGMENTS, SERVICE OF PROCESS: It is presumed in favor of the jurisdiction of the court and in support of the judgment that service of process was duly made, although no evidence thereof appears from the record.—*Eichoff v. Eichoff*, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110.

Suing defendant by wrong name is matter of abatement only, and will not avoid a judgment against him if he has been actually served. So, it seems, where under a complaint entitled

against certain individuals, "composing" an unincorporated association, judgment is taken against it by its common name only.—*Walsh v. Kirkpatrick*, 30 Cal. 202, 89 Am. Dec. 85.

Judgment entered against one in his true name, who was not named as a party defendant, nor served with summons under a fictitious name, but who came in and answered, reciting that he was sued by a certain fictitious name, is binding in a collateral proceeding, although the complaint was not amended by inserting his true name. The service of summons was waived by appearance, and the failure to insert the true name in the complaint was not such an irregularity as rendered the judgment void.—*Johnson v. San Francisco Savings Union*, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129.

Where action was commenced against Doe, Roe, etc., but service was had upon others, whose names are indorsed upon the writ, judgment by default may be entered against the latter. After service had upon them in this way, their failure to appear or defend was equivalent to an admission that they were the persons intended to be sued.—*Curtis v. Herrick*, 14 Cal. 117, 73 Am. Dec. 632.

Judgments rendered as required by law after due service of process, for taxes assessed for street improvement upon property which can not be lawfully taxed for such improvements, are not void but only erroneous and reversible on appeal in a direct proceeding therefor.—*Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595.

RES ADJUDICATA: Parties to controversy can not, after judgment of court having jurisdiction of the parties interest and subject matter, so long as that judgment remains unreversed or unannulled, reopen questions there decided in another action. Such judgment is res adjudicata, and conclusive upon the parties to the controversy and their privies, and they are forever afterwards estopped or barred from reviewing it any new proceeding, for the purpose of the same or any other question passed upon in the former action.—*Joyce v. McAvoy*, 31 Cal. 373, 89 Am. Dec. 172 and note.

A judgment can not be attacked in a collateral action on the ground that it is not supported by the findings.—*Johnston v. San Francisco Savings Union*, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129.

As to judgment against infants, their validity, and how to correct or avoid them when they are erroneous or voidable: See note 89 Am. Dec. 185-193.

JUDGMENT, CONTEMPT: Attack by habeas corpus upon the judgment of

a court committing the prisoner for contempt is subject to the rules applicable to collateral assaults upon judgments in other cases.—*Ex parte Sternes*, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251.

JUDGMENTS AGAINST TRUSTEES: Conclusiveness against beneficiaries: See note 73 Am. St. Rep. 165-168.

CONCLUSIVENESS OF JUDGMENTS: If the court has jurisdiction to render judgment in an action, which it does, and the judgment is not reversed or modified, it is binding on the parties and their privies, and conclusive of the questions litigated, even though erroneously decided; and, even where the court misapplies the law as to any question, the judgment must, nevertheless, stand until corrected in some appropriate way.—*Hodson v. Union Pacific Ry. Co.* 14 Utah, 402, 47 Pac. 859, 60 Am. St. Rep. 902.

If an infant is entitled to vacate a judgment against himself, because based upon his appearance entered by an attorney in an action in which process was not served, he must move promptly for such vacation on coming of age, and if, instead of so doing, he moves for a new trial, and, upon its being denied, appeals and takes no action to question the judgment on the ground that the appearance of the attorney was unauthorized, until after the judgment was affirmed on appeal, he thereby ratifies the action of the attorney in appearing for him, and precludes himself from further questioning the judgment.—*Childs v. Lanterman*, 103 Cal. 264, 35 Pac. 1031, 42 Am. St. Rep. 121.

COLLATERAL ATTACK: A domestic judgment of a court of general jurisdiction, valid on its face, can not be collaterally attacked in the courts of the same state by showing facts outside of the record, although such facts might be sufficient to impeach such judgment in a direct proceeding against it.—*Edgerton v. Edgerton*, 12 Mont. 122, 29 Pac. 966, 33 Am. St. Rep. 557.

EQUITY, RELIEF, FRAUD: A judgment or decree will not be set aside or annulled in equity on account of any fraud which is not extrinsic or collateral to the question examined and determined in the original action. A fraud is not extrinsic or collateral

within the meaning of the rule, unless it is one the effect of which prevents a party from having a fair trial.—*Pico v. Cohn*, 91 Cal. 129, 27 Pac. 537, 25 Am. St. Rep. 159 and note on relief from judgments obtained by perjury, 25 Am. St. Rep. 165-171.

Relief in equity, other than by appellate proceedings, against judgments, decrees, etc.: See note 54 Am. St. Rep. 218-261.

Relief by injunction: See note Sec. 3284.

A collateral attack on a judgment or order can not be successful unless such judgment or order is void.—*Dyer v. Leach*, 91 Cal. 191, 27 Pac. 598, 25 Am. St. Rep. 171.

Judgment void for want of jurisdiction over defendant may be set aside after the lapse of twelve years, on motion. The power of the court to vacate a judgment which appears to be void from an inspection of the judgment roll is inherent. It does not expire by lapse of time, nor is it restricted by Sec. 3241 ante, designating the time within which motions may be made for relief against judgments entered against a party by mistake, accident, surprise, or excusable neglect.

THE EXECUTION OF A VOID JUDGMENT WILL BE STAYED BY THE COURT: Courts will not permit their process to be abused by attempts thereunder to force void judgments. The most effectual mode of preventing abuse of process by using it to enforce a void judgment is by extirpating the judgment itself, by removing a form which is without substance.

Motion to set aside a judgment is a direct and not a collateral attack thereon.—*People v. Greene*, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 44.

If a judgment is void, its validity is not affected by the denial of a motion to vacate it, made many years after its rendition, nor by the affirmance on appeal of the order denying the motion to vacate. Such affirmance is not conclusive of the validity of the judgment against a collateral attack. The affirmance of a void judgment on appeal does not impart any validity to it, especially if it is affirmed on grounds not touching, but overlooking, its validity.—*Pioneer Land Co. v. Maddux*, 109 Cal. 633, 42 Pac. 295, 50 Am. St. Rep. 67.

Section 3496. Judgment when Several Parties Plaintiff and Defendant: Judgment may be given for, or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

ACTION BY HUSBAND AND WIFE:

In an action by husband and wife to recover damages for injuries received by the wife, the verdict and judgment should run to both husband and wife.—*Giffin et ux. v. City of Lewiston* (Idaho), 55 Pac. 545; *Burke v. McDonald*, 2 Idaho, 646, 33 Pac. 49 distinguished.

The statute expressly confers power to determine the rights of the parties on each side of a case as between themselves, when the justice of the case requires it. The mode of procedure, however, is not pointed out by the statute, and as the authority given is one previously possessed only by courts of chancery, we suppose the rules of pleading and practice of those courts, modified by the spirit of the Code, must be resorted to. In those courts, when a defendant sought relief against a co-defendant as to matters not apparent upon the face of the original bill, he must file his cross-bill, alleging therein the matters upon which he relies for relief, making defendants thereto of such co-defendants and others as was proper, and process was necessary to bring them in. The principle is indeed fundamental, that a party shall not be bound by adverse proceedings without notice and an opportunity to

be heard.—*Fletcher v. Holmes*, 25 Ind. 458-465.

The counter-claim of the Code, in equitable actions, is a substitute for the cross-bill of the former equity practice, where the affirmative relief sought by the defendant is against the plaintiff, and the provision of the law permitting defendants to litigate between themselves matters germane to the subject of the complaint, carries with it the right of the defendant seeking relief in that regard to serve an answer in the action, in the nature of a cross-bill setting up the facts, and claiming such relief. Such an answer, however, is essentially a Code pleading, and though the court may require it to be served on the defendant affected thereby, such service is not necessary unless so ordered to preserve the right of the party to have the questions presented by such answer tried and settled by the decree, if the defendant affected is before the court.—*Kollock v. Kaiser*, 73 N. W. Rep. 776 (Wis.)

Without service the court has no power or authority to grant a cross-complainant any affirmative relief against a co-defendant.—*The Hibernia Saving & Loan Society v. Clarke*, 110 Cal. 27, 42 Pac. 425.

Section 3497. Judgment Against One Party, Action to Proceed as to Others: In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper.

1887 R. S. Sec. 4352.

Adding or striking out party: Sec. 3241.

New parties, bringing in: Sec. 3178.

Joining persons severally liable on same instrument: Sec. 3171.

Where defendants jointly and severally liable on contract and part only served, plaintiff may proceed against those served under 3197, and afterwards summon those not served to show cause why they should not be bound by the judgment under: Sec. 3698 to 3703.

ACTION SETTING ASIDE JUDGMENT:

Where, in an action to charge several defendants as partners, the answer denies the partnership and the several liability of the persons sought to be charged, error can not be predicated on the action of the court in setting aside the judgment as to one of the parties defendant, as by Code Civil Proc. Section 352, the court may, in its discretion, render judgment against one or more of several defendants.—*Gaffney v. Hoyt*, 2 Idaho, 184, 10 Pac. 34.

Section 3498. Relief to be Awarded to Plaintiff: The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

1887 R. S. Sec. 4353.

In proceedings against joint debtors, not served, after judgment, even though issue raised upon liability in the origi-

nal action, the judgment can not exceed original judgment with interest: Sec. 3703; also note Sec. 3501.

Section 3499. Action may be Dismissed or Non-

Suit Entered: An action may be dismissed, or a judgment of non-suit entered, in the following cases:

1. By the plaintiff himself, at any time before trial, upon the payment of costs; *Provided*, A counter claim has not been made or affirmative relief sought by the cross-complaint or answer of defendant. If a provisional remedy has been allowed the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon;

2. By either party, upon the written consent of the other;

3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;

4. By the court, when, upon the trial, and before the final submission of the case, the plaintiff abandons it;

5. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register. Judgment may thereupon be entered accordingly.

1887 R. S. Sec. 4354.

Variance: Secs. 3237 to 3239.

Trial, either party may bring on: Sec. 3456.

Plaintiff can not be nonsuited for misjoinder of defendants in forcible entry and detainer but may proceed against those served: Sec. 3981.

Dismissal, petition in insolvency proceedings: Sec. 3950.

DISMISSAL BY PLAINTIFF: Under this section a plaintiff is entitled to a dismissal of his action upon payment of costs, and filing his dismissal with the clerk; and if the provisions of said section require a formal entry of judgment, it is one of the cases in which the law presumes that to have been done which ought to have been done, and the dismissal of the action can not be defeated by the neglect or refusal of the clerk to enter a formal judgment of dismissal.

The omission to enter a judgment of dismissal cannot defeat the plaintiff's dismissal of the action, nor does such dismissal remain in abeyance until the entry of judgment.—*Boyd v. Steele*, Judge (Idaho), 59 Pac. 21.

SAME: Under Sub-division 1, Section 4354, Rev. St. the plaintiff may dismiss at any time before a counter-claim has been made or affirmation relief sought by cross-complaint or answer of defendant.—*Elliott v. Collins* (Idaho), 55 Pac. 301.

DISMISSAL, DIVORCE: It is the policy of the law to discourage divorces, hence whenever the plaintiff in a divorce suits asks to dismiss, and no counter cause of action is set up in a cross-complaint or counter-claim, the refusal of the court to make an order dismissing the action is reversible er-

ror.—*Stover v. Stover* (Idaho), 61 Pac. 462.

PLAINTIFF'S FAILURE TO PROVE THE CASE: Under Sub-division 5, Section 4354, Rev. St. 1887, the court may enter a judgment of nonsuit where the plaintiff fails to prove a sufficient case for a jury.—*Lewis v. Lewis* (Idaho), 33 Pac. 38.

SAME: Where there is evidence to support the case, nonsuit will not be granted.—*Black v. City of Lewiston*, 2 Idaho, 254, 13 Pac. 80.

SAME, JUDGMENT FOR DEFENDANT: When, at the close of trial, there is no evidence to support plaintiff's claim, the cause should be taken from the jury, and judgment entered for the defendant.—*Green v. Christie* (Idaho), 40 Pac. 54; *Spokane & P. Ry. Co. v. Holt* (Idaho), 40 Pac. 56.

As to when nonsuit will be granted on trial of cause see *Fury v. White*, 2 Idaho, 639, 23 Pac. 535.

Where an action to recover specific real property is brought pursuant to Section 2326 of the Revised Statutes of the United States, and there is no evidence for the consideration of the jury, a nonsuit may be granted.—*Lalande v. McDonald*, 2 Idaho, 283, 13 Pac. 347.

CROSS-COMPLAINT, BOTH PARTIES FAILING TO PRODUCE EVIDENCE: When plaintiff refuses to introduce evidence to prove his case, and defendants fail to produce evidence to prove their cross demand against plaintiff, it is error to instruct the jury to find for the defendant. Held, in that case action should have been dismissed, or a judgment of non-suit entered.—*Simmons v. Cunningham* (Idaho), 39 Pac. 1109.

PRIMA FACIE CASE, NONSUIT DENIED: When the evidence of the plaintiff establishes a prima facie case, a motion for a nonsuit at the close of plaintiff's testimony is properly denied.—*Simpson v. Remington* (Idaho), 59 Pac. 360.

In the following case evidence examined and held to establish prima facie case, and that the court erred in taking case from jury.—*New Mexico Ensor Remedy Co. v. Hobson* (Idaho), 43 Pac. 573.

The evidence in this case examined and held, that the plaintiff established a prima facie case, and the court erred in granting a non-suit.—*Kansteiner v. Clyne* (Idaho), 46 Pac. 1019.

The court erred in entering a judgment of nonsuit.—*Lewis v. Lewis* (Idaho), 33 Pac. 38.

PLEADING AND PROOF, VARIANCE, JOINT AND SEVERAL ACTION: H. made a contract to perform certain work and supply certain materials for three different defendants. The contract was made with defendant M. On the trial the other two defendants consent to the taking of judgment against them. After the conclusion of plaintiff's evidence, the counsel for the defendant moved for a nonsuit, on the ground of variance between the pleadings and proofs. The district court overruled the motion for a nonsuit, and, defendant declining to put in any evidence, judgment was rendered in favor of plaintiff against defendant M. Held, that, under the statutes of Idaho, the action of the district court was correct; especially as the acts of defendants were calculated to lead plaintiff to the belief that defendants were jointly interested in the contract.—*Hewitt v. Maize* (Idaho), 51 Pac. 607.

FACTORS AND BROKERS, RIGHT TO COMMISSION: Plaintiff was employed by the defendants to find a purchaser for a certain piece of property at a named sum and plaintiff had some conversation with one P. in regard to the purchase of the property and introduced him to the defendants. Plaintiff also advertised the property for sale. The defendants afterwards notified plaintiff that he was not to act for them any longer in procuring a purchaser for the property, as they did not desire to sell it, but about a month after said notice, they sold the property to P. for a less amount than that named in their agreement with plaintiff. Held, that in an action by plaintiff for his commission, that the refusal of a nonsuit was proper.—*Smith v. Anderson*, 2 Idaho, 495, 21 Pac. 412.

APPEAL, REVIEW, WAIVER OF OBJECTIONS: When a motion for

nonsuit is made by defendant at the close of plaintiff's testimony because of its insufficiency, and overruled, if defendant then introduces his testimony, he waives his right to have the error in overruling the motion reviewed.—*Chamberlain v. Woodin*, 2 Idaho, 609, 23 Pac. 177.

An order sustaining a demurrer and dismissing an action is not an appealable order, and unless final judgment is rendered, the appeal will be dismissed.—*Ah Kle v. McLean*, 2 Idaho, 812, 26 Pac. 937.

A non-suit can not be granted because of mere variance between the plaintiff's complaint and the evidence of his witnesses.—*Wasserman v. Sloss*, 117 Cal. 425, 49 Pac. 566, 59 Am. St. Rep. 209.

Upon a motion for a non-suit, it is the duty of the court to assume as true all facts which could be properly found by a jury from the evidence, and to give the plaintiff the benefit of every fair and legitimate inference and intendment which can arise from the evidence; and, unless it appears, after this is done, that the plaintiff has failed to prove his case, a non-suit should not be granted.—*Lowe v. Salt Lake City*, 13 Utah, 91, 44 Pac. 1050, 57 Am. St. Rep. 708.

Compulsory non-suit may be directed by the court. A motion for non-suit on one ground is implied waiver of others; and a different position can not be assumed on appeal from that taken in the court below. A non-suit will be granted if the evidence given by plaintiff would not authorize jury to find a verdict for him; or if the court would set it aside, if so found, as contrary to the evidence.—*Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303.

It is discretionary with court to allow plaintiff to introduce evidence after motion for non-suit.—*May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135.

Order of court below dismissing action for want of prosecution will not be reversed by the supreme court unless there has been an abuse of discretion; and it is incumbent on the appellant to establish affirmatively that there has been such abuse of discretion. Court is justified in dismissing action because of plaintiff's want of diligence in allowing an action to rest, without service of summons, for two years and eight months after the summons is issued. An action may be dismissed by the court for want of prosecution, notwithstanding entry of default, where the notice to dismiss is given before summons is served, and the plaintiff then serves the summons, and at the end of ten days takes a default, but judgment

is not entered up. The dismissal takes effect by relation back to the time of service of the motion.—*Grigsby v. Napa County*, 36 Cal. 585, 95 Am. Dec. 213.

Error in granting non-suit is error of law, and if excepted to and specified

as such, may be reviewed on appeal, without any specifications of particulars wherein the evidence was insufficient.—*Hammond v. Wallace*, 85 Cal. 522, 24 Pac. 837, 20 Am. St. Rep. 239.

Section 3500. All Other Judgments are on the Merits: In every case, other than those mentioned in the last Section, judgment must be rendered on the merits.

1887 R. S. Sec. 4355.

A judgment on pleading is not a non-suit, but held inferentially to be a judgment on merits under provisions of this section.—*Johnson v. Manning*, 2 Idaho, 1073, 29 Pac. 101.

JUDGMENT ON PLEADINGS: Where any of the material allegations of the complaint are denied by the answer, it is error to render judgment on the pleadings.—*Johnson v. Manning*, 2 Idaho, 1073, 29 Pac. 101.

Judgment on the pleadings can not be entered so long as there remains material issues of fact raised by the pleadings undetermined.—*Alsbaugh v. Reid* (Idaho), 55 Pac. 300.

JUDGMENT ON DEMURRER: A judgment on demurrer to a bill in chancery, that the bill is bad in substance, or does not state facts sufficient to constitute a cause of action can not be pleaded in bar to a good bill for the same cause of action. Such judgment is in no sense a judgment on the merits.—*Lockett v. Lindsay*, 1 Idaho, 324.

Plaintiff is not entitled to judgment on the pleadings, where the defendant denies the right of the plaintiff and sets up title in himself.—*Union Water Company v. Crary*, 25 Cal. 145, 85 Am. Dec. 145.

JUDGMENT UPON FAILURE TO ANSWER.

Section 3501. In what Cases Judgment may be had, Default: Judgment may be had, if the defendant fail to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs against the defendant, or against one or more of several defendants, in the cases provided for in Section 3197.

2. In other actions, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply at the first or any subsequent term of the court for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account be involved by a reference as above provided;

3. In actions where the service of the summons was by publication, the plaintiff upon the expiration of the time for answering, may, upon proof of the publication, and that no answer has been

filed, apply for judgment; and the court may thereupon require proof to be made of the demand mentioned in the complaint and if the defendant be not a resident of the State, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover.

1887 R. S. Sec. 4360.

Judgment cannot exceed amount demanded in the prayer to the complaint: Sec. 3498.

Clerk should endorse memorandum on complaint that the default of the defendant for not answering was entered: Sec. 3509.

Upon judgment for either plaintiff or defendant on an issue of law the proceedings are in accordance with this section: Sec. 3486.

Default of new parties ordered brought in: Sec. 3178.

Judgment, default, relief from: Sec. 3241.

Judgment by default forcible entry and detainer: Sec. 3986.

Default, actions to quiet title, costs not to be entered: Sec. 3380.

MUST FOLLOW PRAYER OF COMPLAINT: When judgment is entered upon the default of the defendant, the recovery must follow the prayer of the complaint.—*Lowe v. Turner*, 1 Idaho, 107, citing *Lamping & Co. v. Hyatt*, 27 Cal. 99.

AFTER DEMURRER SUSTAINED AS TO CO-DEFENDANT: It is error to enter judgment against one of the defendants, after having sustained a demurrer to the complaint upon the ground that such pleading "does not state facts sufficient to state a cause of action" without first amending same, where all the averments of the complaint apply equally to both defendants.—*Lowe v. Turner*, 1 Idaho, 107.

TROVER AND CONVERSION, DAMAGES, DEFAULT: In an action for the wrongful sale of personal property, and the wrongful conversion of the proceeds thereof, it is error for the clerk to enter a final judgment as upon default, but the plaintiff in such case should go into court and prove his damages.—*Parke v. Wardner*, 2 Idaho, 263, 13 Pac. 172.

DEFAULT JUDGMENTS, APPEALABLE: Judgments entered by a clerk on default, and those rendered by a court after trial upon issues, are equally final judgments within the meaning of the statutes concerning appeals.—*Hardiman v. South Chariot Mining Company*, 1 Idaho, 704.

ENTRY OF DEFAULT BY CLERK.

The clerk derives all his power in entering a default, without an order of court, from the statute, and when he enters a default it must appear that all the facts existed which the law requires to authorize it.

When the defendant demands a bill of particulars, and obtains an order to answer within ten days after the bill is served, and a bill is served which does not contain the items of the account, the clerk may enter a default and judgment if the defendant fails to answer within ten days.—*Providence Tool Co. v. Prader*, 32 Cal. 634, 91 Am. Dec. 598.

Judgment by default entered by a clerk is void when he is not authorized to enter it by statute, as where he acted upon a return of the service of summons not sworn to nor appearing on its face to be an official act.—*Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52. And the defendant may appeal from the judgment or move for relief under Sec. 3243.—*Haword v. Gallaway*, 60 Cal. 10.

A judgment by default, rendered before the time allowed the defendant to answer has expired, is erroneous merely and can be attacked only upon motion or by appeal, and by the party aggrieved.—*In re Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146.

JUDGMENT BY DEFAULT, VACATING: It is not negligent, within the meaning of the law as to defaults, for a defendant's attorney not to withdraw a frivolous demurrer, and file an answer, before the demurrer has been disposed of in the ordinary course of practice.—*Anaconda Mining Co. v. Salie*, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472.

The relief which can be granted upon a judgment by default cannot exceed that demanded in the complaint. Hence, if the complaint prays that the defendant be restrained from transferring certain property, it is error, in a decree entered upon default, to provide that the defendant transfer such property to a receiver.—*Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147. See also Sec. 3498.

MANNER OF ENTERING JUDGMENT.

Section 3502. Judgment to be Entered in Twenty-four Hours: When trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

1887 R. S. Sec. 4450.

Section 3503. Cause may be Brought Before Court for Argument: When the case is reserved for argument or further consideration, as mentioned in the last Section, it may be brought by either party before the court for argument.

1887 R. S. Sec. 4451.

Section 3504. When Counter Claim Established Exceeds Plaintiff's Demand: If a counter claim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

1887 R. S. Sec. 4452.

Section 3505. In Replevin: In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

1887 R. S. Sec. 4453. First Portion.

THE JUDGMENT, FORM OF: The judgment of the court in an action of claim and delivery, when verdict is given for the defendant should be in the alternative for the return of the prop-

erty or its value. If the return cannot be had as such return is an appropriate remedy, the verdict need not be in the alternative.—*Johnson v. Fraser*, 2 Idaho, 371, 18 Pac. 48.

Section 3506. Gold Coin or Currency, Judgment: In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, or decision, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein, and in all actions for the recovery of money, if the plaintiff allege in his complaint that the same was understood or agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such

person in a fiduciary capacity, or to the use of another judgment for the plaintiff, must be made payable in the kind of money or currency so received by such person.

1887 R. S. Sec. 4453. Last Portion.

Execution, judgment, specific kind of money: Sec. 3532.

GOLD COIN: A judgment for gold coin is not in any event void because it is so rendered. It may be irregular but is then subject to modification only, either in the same court on motion or on appeal by the appellate court.—*Hazard v. Cole*, 1 Idaho 276.

Judgment should not be made payable in gold coin, unless it was specifically contracted for; and there is no such contract in the bond of an infant guardian, where the obligation is "to pay the sum of four thousand dollars lawful money of the United States."—*Fox v. Minor*, 32 Cal. 111, 91 Am. Dec. 566.

Section 3507. Judgment Book to be Kept by Clerk:

The clerk must keep with the records of the court, a book to be called the "judgment book," in which judgments must be entered.

1887 R. S. Sec. 4454.

Judgments and orders, entered either in term or vacation: Sec. 3001.

Costs, entered by clerk in blank left in judgment and judgment docket for that purpose, including interest on verdict or decision: Sec. 3732.

Recording judgment certified back after change of venue: Sec. 3187.

Award of arbitrators, entry of in judgment book has effect of judgment: Sec. 3881.

Judgment by confession when may be entered: Sec. 3955.

Court may amend its conclusions of law after they are filed and before entering judgment, or may vacate an order directing judgment to be entered and thereafter render judgment for a different amount when the findings of fact warrant it.—*Curtis v. Walling*, 2 Idaho, 383, 18 Pac. 54.

JUDGMENT, RENDITION, ENTRY:

An entry by the clerk, at the end of the trial, in the minutes of the court, of the decision of the judge does not constitute a judgment, though it constitutes the rendition of judgment when findings are waived.

When findings of fact are not waived, and are filed by the court, they constitute the rendition of judgment, the entry of which becomes the ministerial duty of the clerk, which may be performed by him at any time, even after the expiration of office of the judge rendering the decision.—*Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491.

Judgment of divorce, after being signed by the judge and filed with the

A contract agreeing to pay a specific sum in gold coin, or upon failure thereof to pay such further sum as may be equal to the difference in value between gold coin and legal tender notes may be enforced according to its meaning, and the meaning of such contract is that the maker will pay in gold coin, or if he does not do so, in legal tender notes at their gold value and a judgment may be rendered on such contract payable in gold coin alone.

If note is made payable in alternative either in gold or legal tender notes, a judgment rendered on it may also be in the alternative.—*Lane v. Gluckauf*, 28 Cal. 288, 87 Am. Dec. 121 and note.

clerk, is binding upon the parties and their privies, although not entered by the clerk.—*Estate of Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146.

A judgment becomes "rendered" at the time the court pronounces its decision, and it is not necessary to its validity that it should be in writing signed by the judge. A judgment of divorce rendered in favor of a party during her life time may be entered after her death.—*In re Cook*, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431.

AMENDMENT OF JUDGMENT:

An amendment of a judgment can be allowed only for the purpose of making the record speak the truth, and not for the purpose of revising or changing the judgment. If an inspection of the record does not show an error of the clerk in entering the judgment, resort must be had to extrinsic evidence, and parties to be affected by a motion to amend the judgment must be given notice thereof and an opportunity to resist it, but it cannot be amended so as to include provisions or directions not proper to have been made at the date of its original entry upon the allegations of the pleadings. An execution may be quashed on the ground that the amendment of the judgment by which the execution of the judgment was authorized was void.—*Scamman v. Bonslett*, 118 Cal. 293, 50 Pac. 272; 62 Am. St. Rep. 226.

POWER TO CORRECT RECORD:

Courts of record have inherent power to correct their records, so that they shall conform to the actual facts, and such corrections may be made at any

time, without notice either upon motion of the court or of any party interested, and the record when so corrected, as well as the order making the correction, is conclusive upon any other court in which it is offered as evidence. A judgment need not be signed by the judge rendering it, and upon his failure to authenticate it during his term of of-

fice, it may be authenticated by his successor without impairing its effect.—*Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491.

Where judgment is improperly entered for damages, the damages may be remitted, and the remainder of the judgment stand.—*Curtis v. Herrick*, 14 Cal. 117, 73 Am. Dec. 632.

Section 3508. If a Party Die After Verdict, Judgment not a Lien: If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable, in the course of administration on his estate.

1887 R. S. Sec. 4455.

Death of party, action not to abate:

Sec. 3174.

Judgment against decedent in life

time, estates, order of preference of payment: Sec. 4259.

Judgment on claim against estate, enforcement, no lien, no execution: Sec. 4146.

Section 3509. Judgment Roll, what Constitutes: Immediately after entering the judgment, the clerk must attach together and file the following papers, which constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons with the affidavit or proof of service, and the complaint, with a memorandum endorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment;

2. In all other cases, the pleadings, a copy of the verdict of the jury, or finding of the court, or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision.

1887 R. S. Sec. 4456.

Judgment roll, on confession of judgment: Sec. 3957.

Judgment roll and judgment upon agreed case: Sec. 3960.

Judgment roll, certiorari, consists of judgment, writ and petition: Sec. 3767.

Judgment roll, voluntary dissolution of corporations: Sec. 3840.

Judgment roll, lost papers supplying copy: Sec. 3738.

JUDGMENT ROLL, WHAT CONSTITUTES: Sub-division 2, Section 4456. Rev. St. 1887, provides that the judgment roll shall consist of "the pleadings, a copy of the verdict of the jury or findings of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer or relating to a change of parties, and a copy of the judgment."—*Rich v. French* (Idaho), 35 Pac. 173.

SUMMONS AND PROOF OF SERVICES: Under the provisions of Section 4456 Rev. St. in cases where the complaint is not answered by any defendant, the "summons with the affidavit of proof service," is a part of the judgment roll.—*Vermont Loan & Trust Co. v. McGregor* (Idaho), 51 Pac. 104.

The judgment roll constitutes the record of a court of superior jurisdiction. Jurisdiction of a court of superior jurisdiction will be conclusively presumed unless the judgment roll shows upon its face that the court did not have jurisdiction. Where judgment is by default, judgment roll consists of summons, the affidavit or proof of service, the complaint with the default indorsed thereon, and a copy of the judgment.—*Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

The finding or recital of due service

of process is not conclusive when the proof of service is a part of the judgment roll, and, as it appears in such roll, is not sufficient evidence of such service, as where it is not sworn to nor

does it appear to be certified by any officer as such.—*Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52.

Section 3510. Judgment Lien, when Begins and when Expires: Immediately after filing the judgment roll, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him, and from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time or which he may afterwards acquire, until the lien expires. The lien continues for two years unless the judgment be previously satisfied, or unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this Code, in which case the lien of the judgment ceases.

1887 R. S. Sec. 4457.

A justice's judgment becomes a lien when an abstract thereof is filed with the district clerk: Sec. 3663.

UNLAWFUL DETAINER, ETC., One who takes title by conveyance from a judgment debtor takes it subject to the lien of the judgment, and especially is that so when the conveyance excepts from the covenants in the deed, judgments of record.—*First Nat. Bank of Lewiston v. Hayes* (Idaho), 61 Pac. 287.

M. being the common source from whom appellants and respondents procured title to certain land, a sheriff's deed was executed, the basis of which was a judgment against M., and which judgment was a lien on said land at the date of the conveyance to respondents. Held, that said respondents were bound by the recitals in said deed, and are privies to said judgment.—*First Nat. Bank of Lewiston v. Hayes* (Idaho), 61 Pac. 287.

Lien of judgment is purely a creature of the statute, and the statute only provides that a judgment shall become a lien from the time it is docketed upon the property of the judgment debtor "not exempt from execution."—*Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516.

A judgment against one who has transferred real property for the purpose of defrauding his creditors is a lien thereon and a judgment creditor is entitled to redeem such real property from execution sale.—*First Nat. Bank v. Maxwell*, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64.

The time during which a judgment remains a lien on real estate commences to run from the docketing of the judgment, unless the judgment is stayed by an order of the court pending a motion for new trial, or a stay bond on appeal. The time during which proceed-

ings are so stayed must be excluded from the computation and if any time is allowed to elapse between the docketing of the judgment and the stay of proceedings, such time must be included in the computation. The filing of a stay bond suspends the running of the time during which the judgment remains a lien until the filing of the remittitur from the supreme court.—*Barroilhet v. Hathaway*, 31 Cal. 395, 89 Am. Dec. 193.

A judgment docketed against the judgment debtor during his life time does not cease to be a lien upon his death, but continues to be a lien for the period prescribed by statute as the life time of judgment liens.—*Morton v. Adams*, 124 Cal. 229, 56 Pac. 1038, 71 Am. St. Rep. 53.

A lien charged by a judgment of divorce, in favor of the wife, upon land which was a part of the community property, but which has been set apart to the husband, to secure installments of alimony awarded as they fall due is not affected by a general statute making a judgment lien expire in two years from the time it is docketed.—*Gaston v. Gaston*, 114 Cal. 542, 46 Pac. 609, 55 Am. St. Rep. 86.

PRIORITY BETWEEN JUDGMENT AND MORTGAGE LIENS: When a second mortgage is given upon express agreement that the first mortgage shall be satisfied with the money advanced, a judgment creditor of the mortgagor whose judgment is docketed before the satisfaction and cancellation of the first mortgage or the recording of the second mortgage, and who subsequently purchases the premises at execution sale under his judgment, without notice of the agreement or nature of the dealings between the parties to the second mortgage, has a lien superior to the rights of the second mortgagee. The

latter is not entitled, as against such purchasers, to be subrogated to the rights of the first mortgagee.

A lien will be kept alive, under some circumstances, in favor of one who has paid the lien holder, although the latter has satisfied and discharged it of record, but where the equity is a latent one, the lien will not be kept alive to the prejudice of a bona fide purchaser. —*Richards v. Griffith*, 92 Cal. 493, 28 Pac. 484, 27 Am. St. Rep. 156.

The purpose of an attachment is to hold property of the defendant as security for such judgment as may be rendered, and when the judgment is rendered, and becomes a lien upon the property attached the lien of the attachment becomes merged in that of the judg-

ment, and its only effect thereafter is to preserve the priority thereby acquired, which priority is maintained and enforced under the judgment. The attachment lien does not revive on the expiration of the judgment lien. To preserve priority acquired by the judgment lien, the sale must be made during the statutory period of the lien. Where no judgment or attachment lien exists the levy operates upon real property as it does upon personal property; that is, the execution first served has priority. Levy of execution upon real estate, during pendency of judgment lien, neither extends such lien nor creates a new lien.—*Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256.

Section 3511. Docket, how Kept, what to Contain:

The docket mentioned in the last Section is a book which the clerk keeps in his office with each page divided into columns and headed as follows:

Judgment debtors; Judgment creditors; Judgment—time of entry; Where entered in judgment book; Appeals—when taken; Judgment of appellate court; Satisfaction of Judgment—when entered. If judgment be for the recovery of money or damages, the amount must be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the action or of the relief granted must be stated. The names of the defendants must be entered in alphabetical order.

1887 R. S. Sec. 4458.

Section 3512. Docket Open for Inspection Without Charge: The docket kept by the clerk is open at all times during office hours for the inspection of the public, without charge. The clerk must arrange the several dockets kept by him in such a manner as to facilitate their inspection.

1887 R. S. Sec. 4459.

Section 3513. Transcript Filed in any County, Judgment Becomes a Lien there: A transcript of the original docket certified by the clerk, may be filed with the recorder of any other county, and from the time of the filing the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution in such county, owned by him at the time or which he may afterwards and before the lien expires, acquire. The lien continues for two years, unless the judgment be previously satisfied, or unless the enforcement of the judgment be stayed upon appeal, as hereinbefore provided.

1887 R. S. Sec. 4460.

Section 3514. Satisfaction of Judgment, how Made: Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowl-

edgment of a conveyance of real property by the judgment creditor; or by his endorsement on the face, or on the margin of the record of the judgment, or by the attorney, unless a revocation of his authority is filed.

Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment or make such indorsement, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it.

1887 R. S. Sec. 4461.

Judgment, forcible entry and detainer when term of lease unexpired, payment of rent within five days satisfies and writ of restitution will not issue: Sec. 3990.

BY ASSIGNEE OF JUDGMENT: Plaintiff sued to foreclose a mortgage, and defendant obtained judgment for costs, which judgment defendant assigned to her attorney. By request of attorney for plaintiff, said assignee sent a receipt to a bank in another state, with instructions to receive the money for him, and deliver the receipt. The plaintiff paid the money to said bank, took up the receipt, and filed it in the action. Plaintiff sued said assignee in said other state to recover a debt alleged to be due it from the said assignee, and garnished the money in the hands of the bank. The assignee moved to strike the receipt from the files, and that the execution issue on the judgment, and the court so ordered. Held, that said order was erroneous, that payment to the bank (agent of the assignee) satisfied the judgment, and that the former of the states where the garnishment was had is the proper tribunal to decide the questions between the plaintiff and said assignee.—*Vermont Loan & Trust Co. v. McGregor* (Idaho), 53 Pac. 399.

JUDGMENT LIEN, SATISFACTION.

A judgment lien is a vested right of property and cannot be satisfied except by the payment or release.—*Smith v. Richards*, 2 Idaho, 464, 21 Pac. 419.

Payment of part of amount due on money judgment, under a contract that it shall operate as satisfaction in full does not discharge the judgment, such agreement being without consideration

and void.—*Deland v. Hiatt*, 27 Cal. 611, 87 Am. Dec. 102.

MONEY RECEIVED UNDER AN INVALID ASSIGNMENT, ESTOPPEL: Money collected upon a judgment by the assignee, under an invalid assignment, may be recovered by a judgment creditor of the party who is rightfully entitled to it. The claimant of the proceeds of a judgment, under the rightful owner, is not estopped by the judgment in favor of the assignee, under an invalid assignment, unless it is shown that the fact of the assignment was put in issue between the debtor and the alleged assignee.—*Blood v. Marcuse*, 38 Cal. 590, 99 Am. Dec. 435.

PAYMENT BY A GARNISHEE: If the judgment creditor assigns the judgment, and the judgment debtor, without notice of the assignment afterwards pays the same voluntarily to the sheriff by reason of the service of garnishee process upon him, the rights of the assignee are not affected, and he may still enforce the judgment.—*Brown v. Ayers*, 33 Cal. 525, 91 Am. Dec. 655.

If a judgment is paid by a surety of one of the defendants, and thereafter he and others seize and sell property in pretended satisfaction of it, their acts constitute a naked trespass, for which all are jointly and severally liable.—*March v. Barnet*, 121 Cal. 419, 53 Pac. 923, 66 Am. St. Rep. 44.

Person may receive money due on a judgment rendered in favor of himself and others, co-plaintiffs, but he cannot without authority from his co-plaintiffs, set off a judgment due to him and them jointly against another judgment held by the defendant in such joint judgment against himself alone.—*Corwin v. Ward*, 35 Cal. 195, 95 Am. Dec. 92.

CHAPTER CXLVII.

EXCEPTIONS.

3515. Exception defined, when taken, time for settlement.

3516. What deemed excepted to.

3517. Exception, form of.

3518. Bill of exceptions.

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Section.

3520. Exceptions after judgment, etc.

3521. Exception refused, application to supreme court.

3522. Proceedings where judge ceases to hold office.

Section 3515. Exception Defined, when Taken, Time for Settlement: An exception is an objection upon a matter of law, to a decision made either before or after judgment, by a court, tribunal, judge, or other judicial officer in an action or proceeding.

Except as provided in the next Section, the exception must be taken and settled at the time the decision is made, and no order of court shall be made for the settlement of such exception at any other time except by the agreement of both parties.

When an exception is taken, the court, judge, tribunal, or judicial officer shall allow sufficient time for the reduction to writing, and settlement of the same, and in case such time shall not be allowed, or such exception shall not be fairly settled, the facts may be shown by affidavit, and the party taking such exception may apply to the court, or tribunal, to which an appeal lies, in the action or proceeding, to settle the same fairly, according to the facts, and when so settled, the same shall become a part of the record in such action or proceeding.

1887 R. S. Sec. 4426.

Exceptions, bill of, notice of motion for new trial, extends time until ten days after service thereof: Sec. 3526.

Extension of time, power of the court, Sec. 3744.

Exceptions in insolvency proceedings: Sec. 3949.

It is undoubtedly the general rule that when a party seeks to reverse a judgment rendered in the inferior court, he must except to the ruling of the court, and assign the error in this court on appeal. The exceptions to this rule are where a complaint is so radically defective that it discloses no cause of action, and will not support a judgment; as where a judgment has been taken by default and the appellant could not except by reason of his non-appearance, and the plaintiff was bound to see that the proceedings were regular and legal.—*Lamkin v. Sterling*, 1 Idaho, 120; *Smith v. Sterling*, 1 Idaho, 128; *Goodman v. Minear Mining and Milling Company*, 1 Idaho, 131.

When there is sufficient in a complaint to support a judgment, notwithstanding it may be defectively stated and open to demurrer in the first instance, still if the judgment thus rendered be not excepted to, the appellant has lost his rights, and cannot reverse the judgment, however patent the error.—*Lamkin v. Sterling*, 1 Idaho, 120.

WHEN EXCEPTION MUST BE TAKEN: If a party desires to have a decision of the district court reviewed by the supreme court, he must except thereto when the ruling or decision is made; and he must also preserve and bring up such exceptions by bill of exceptions, or statement.—*People ex rel. Huston v. Hunt*, 1 Idaho, 433.

There is no rule of practice governing legal proceedings more clearly defined nor better settled, than that any objection of whatever character, whether with reference to the regularity of the proceedings on trial of the cause, or error of law committed by the judge in relation to a motion, or any ruling whatever on a question of law arising during the proceedings, must be taken at once, at the time when the question arises.—*Lamkin v. Sterling*, 1 Idaho, 120.

The Code has denominated the hearing and disposing of questions or issues of law, trials. When, therefore, a case is called to dispose of any issue, whether of law or fact, it is, in contemplation of Section 3515 called for trial, so far at least as to require all the rulings of the court, which it is desired to have reviewed in an appellate court, incorporated into a bill of exceptions.—*Lamkin v. Sterling*, 1 Idaho, 120.

EXCEPTIONS NOT SAVED: Exceptions will not be considered unless saved.—*Coffin et al. v. Bradbury* (Idaho), 35 Pac. 715.

Where the record shows that all instructions given were given by the court, and does not show that any were given upon request or suggestion of either party, the presumption is that all instructions were given by the court upon its own motion; and in such case, to entitle exceptions thereto to be heard, the record must show that such exceptions were taken before verdict.—*State v. Hurst* (Idaho), 39 Pac. 554.

BILL OF EXCEPTIONS, SETTLEMENT, EXTENSION OF TIME: When exceptions to evidence are taken during the trial, but such exceptions are not

settled until two months after the trial and more than a month after the filing the decision, the appellant having then prepared a case embodying a bill of exceptions in which bill the exceptions taken during the trial are included and the case containing such bill is allowed and settled without objection in the presence of the attorneys for the responsive parties. Held, that such exceptions are not waived. Held, also, that by the failure to object at the settlement, the party is deemed to have agreed to the extension of time under

Sec. 4426 of the Statutes of Idaho.—*Lockhart v. Rollins*, 2 Idaho, 503, 21 Pac. 413.

Party standing by pleading need not reserve exceptions to decision sustaining a demurrer thereto, in order to take advantage of the ruling on appeal from the judgment. The purpose of reserving an exception is to make matter of record the decision of the court upon a question of law presented to it, which would not otherwise appear of record.—*Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344.

Section 3516. What Deemed Excepted to: The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them; an order or decision made upon a contested motion; an order or decision from which an appeal may be taken; an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance an order made upon ex-parte application, and an order or decision made in the absence of a party, are deemed to have been excepted to and such exception to the verdict of a jury; to the final decision of an action or proceeding; to an order or decision finally determining the rights of the parties or any of them; to an order sustaining or overruling a demurrer; or to any other order or decision included within the terms of this Section, where such order or decision and the papers upon which it is made are a part of the records and files in the action, need not, unless desired by the party objecting thereto, be embodied in a bill of exceptions, but the same, appearing in the record or files, may be reviewed upon appeal as though settled in such bill of exceptions.

1887 R. S. Sec. 4427.

An exception to an order denying a new trial is saved by the provisions in this section without the interposition of a formal objection to the ruling of the court or judge.—*Hattibaugh v. Vollmer* (Idaho), 46 Pac. 831.

PRACTICE, EXCEPTIONS: The exceptions, which by Section 201 (4427) of the civil practice act, the adverse party is deemed to have taken, have the same force and effect in the conduct of the action as other exceptions taken during trial, and cannot be considered on appeal without being incorporated into a bill of exceptions and thus made a part of the record.—*Fox v. West*, 1 Idaho, 782.

Orders or decisions deemed excepted to by statute must, nevertheless, be included in a bill of exceptions.—*Guthrie v. Phelan*, 2 Idaho, 89, 6 Pac. 107.

Exception to order sustaining motion for judgment on the pleadings must be incorporated in bill of exceptions or it will not be reviewed on appeal.—*Purdum v. Taylor*, 2 Idaho, 153, 9 Pac. 607.

EXCEPTIONS, ORDER SUSTAINING DEMURRER: An exception

deemed to have been taken to the order sustaining the demurrer, should have been settled in a bill of exceptions, and brought to the supreme court. When it is not done, this court will not consider it.—*Berry v. Alturas County*, 2 Idaho, 274, 13 Pac. 233.

Where defendants in a trial court question the sufficiency of the complaint by demurrer, and the demurrer is overruled, and defendants waive their rights to save the question so raised by not taking a bill of exceptions, only appealing from the judgment, another demurrer raising the same question cannot be interposed on appeal.—*Guthrie v. Phelan*, 2 Idaho, 89, 6 Pac. 107.

DEMURRER, INTERPOSITION ON APPEAL: Where defendants in a trial court question the sufficiency of a complaint by demurrer, and demurrer is overruled, and the ruling is not saved by bill of exceptions, another demurrer raising the same question cannot be interposed on appeal.—*Guthrie v. Fisher*, 2 Idaho, 101, 6 Pac. 111.

Under the provisions of Section 4427. Rev. St. 1887, an order overruling or

sustaining a demurrer need not be embodied in a bill of exceptions to be reviewed on appeal. If the same appears in the records or files it may be reviewed on appeal as though settled in a bill of exceptions.—*Palmer v. Pettin-gill* (Idaho), 55 Pac. 623.

Exception to ruling on demurrer need not be taken nor embodied in a bill or statement.—*Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344. To same effect as to order adjudging costs, when required to be made part of the judgment roll.—*Mining Co. v. Weinstein*, 7 Mont. 352, 17 Pac. 108. As to order denying motion for a new trial.—*State v. C. P. R. R. Co.* 17 Nev. 269, 30 Pac. 887. As to ruling on demurrer.—*Boukofsky v. Powers*, 1 Utah, 334. As to order striking pleadings from files.—*Gregg v. Groesbeck*, 11 Utah, 322, 40 Pac. 202. As to order denying motion for continu-

ance when based on affidavit inserted in transcript, but not a part of the judgment roll.—*See Barber v. Briscoe*, 8 Mont. 222, 19 Pac. 589.

An order refusing to allow the plaintiff to file a supplemental complaint is not an order deemed excepted to under this section and such order cannot be reviewed upon appeal from the judgment without being incorporated in a bill of exceptions.—*Giddings v. The 76 L. & W. Co.* 109 Cal. 116, 41 Pac. 788.

An order striking out parts of a pleading is not part of the judgment roll, and can be reviewed upon appeal only upon a bill of exceptions. The fact that such order is deemed in law to be excepted to cannot dispense with the necessity of incorporating the order in a bill of exceptions.—*Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696; *Taylor et al. v. McCormick* (Idaho), 64 Pac. 239.

Section 3517. Exception, Form of: No particular form of exception is required. But when the exception is to the verdict or decision, upon the grounds of the insufficiency of the evidence to sustain it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated, with so much of the evidence or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto, sufficient to identify them may be made.

1887 R. S. Sec. 4428.

A bill of exceptions must state the evidence which was admitted by the court over the objections of the party excepting to the introduction of such evidence, with the grounds upon which the objection is made, or else such exceptions will not be considered by the court.—*Naylor v. Vermont Loan & Trust Co.* (Idaho), 55 Pac. 297.

PRACTICE, FINDING: When no testimony is reported in a statement from which this court can determine as to the propriety or impropriety of the findings of the court below, the presumption is that the testimony was in every respect, sufficient to support the findings.—*Hazard v. Cole*, 1 Idaho, 276.

Where instructions are given by the court upon its own motion, they must be excepted to before verdict to be considered in appellate court.—*State v. O'Donald* (Idaho), 39 Pac. 556.

GENERAL EXCEPTION TO INSTRUCTIONS: Where the court gives a general charge to the jury and the charge contains various propositions of law and a general exception only is taken, such exception is not sufficient.—*Black v. City of Lewiston*, 2 Idaho, 254, 13 Pac. 80.

An exception to the verdict, on the ground of the insufficiency of the evidence to justify it, can not be reviewed on an appeal from the judgment unless the appeal is taken within 60 days after the rendition of judgment.—*Young v. Tiner* (Idaho), 38 Pac. 697; *Holt v. Spokane & P. Ry. Co.* (Idaho), 35 Pac. 39.

STATEMENT, AUTHENTICATION. An agreement by the respective parties to an action that a certain document is the statement in the case is, substantially, an agreement that such statement is correct.—*Moore v. Taylor*, 1 Idaho, 583.

REFERENCE TO PAPERS: An intelligible and definite reference in a statement to papers and exhibits, by letters or numbers, as attached to and constituting a part of the statement, is sufficient, without any incorporation of the same at length in the statement.—*Moore v. Taylor*, 1 Idaho, 583.

IDENTIFICATION OF PAPERS: Where affidavits, depositions, or minutes of the court are incorporated into a statement, either in *haec verba* or by appropriate reference, it is unnecessary to have any further identification of them.—*Moore v. Taylor*, 1 Idaho, 583.

As to the necessity of incorporating

exceptions into bill to secure their review in the appellate court see generally Sections 3516 and 3519 and cases there cited.

A bill of exceptions containing no specifications of the insufficiency of the

evidence to justify the decision, can not be considered upon appeal for the purpose of reviewing the evidence embodied therein.—*Commercial Bank v. Redfield*, 122 Cal. 407, 55 Pac. 160.

Section 3518. Bill of Exceptions: A bill containing the exception to any decision may be presented to the court or judge for settlement at the time the decision is made, and after having been settled, shall be signed by the judge and filed with the clerk. When the decision excepted to is made by a tribunal other than a court, or by a judicial officer, the bill of exceptions shall be presented to, and settled and signed by such tribunal or officer.

1887 R. S. Sec. 4429.

BILL OF EXCEPTIONS, WHAT CONSTITUTES: A bill of exceptions settled and signed by the trial judge will be treated as such although it is

denominated a statement.—*Schultz v. Keeler*, 2 Idaho, 305, 13 Pac. 481.

On an appeal from an order made after judgment on a contested motion no bill of exceptions is required.—*Theissen v. Riggs* (Idaho), 51 Pac. 107.

Section 3519. Bill of Exceptions, Preparation and Settlement of:

When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within ten days after the entry of judgment, if the action were tried with a jury, or after receiving notice of the entry of judgment, if the action were tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party. Within ten days after such service, the adverse party may propose amendments thereto, and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must within ten days thereafter, by the party seeking the settlement of the bill, be delivered to the clerk of the court for the judge who tried or heard the case. When received by the clerk, he must immediately deliver them to the judge, if he be in the county; if he be absent from the county, and within the State, and either party desire the papers to be forwarded to the judge, the clerk must, upon notice in writing of such party, immediately forward them by mail, or other safe channel; if not thus forwarded, the clerk must deliver them to the judge immediately after his return to the county. When received from the clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated, the judge must settle the bill. If the action was tried before a referee, the proposed bill, with the amendments, if any, must be presented to such referee for settlement within ten days after service of the amendments, and thereafter, upon notice of five days to the adverse party, the referee shall settle the bill. If no amendments are served, or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee, for settlement without notice to the adverse party. It is the duty of the judge or referee, in settling the bill, to strike out of it all redundant and useless matter, so that the

exceptions may be presented as briefly as possible. When settled, the bill must be signed by the judge or referee, with his certificate to the effect that the same is allowed and shall then be filed with the clerk.

1887 R. S. Sec. 4430.

Extension of time for settlement, etc.: See cross-reference under Sec. 3515.

Service of hearing of motions generally: Chap. CLXVII.

Manner of service of notice and papers generally: Chap. CLXVIII, Secs. 3711 to 3717. *Stickney v. Hanrahan* (Idaho), 63 Pac. 159.

BILL OF EXCEPTIONS, SETTLEMENT AND SIGNING, STIPULATION OF PARTIES: An agreement of the parties to an action of trial appearing in the record that the exceptions taken at the trial may be settled at any time is sufficient to authorize the trial judge to settle a bill of exceptions or statement after the trial.—*Sebree v. Smith*, 2 Idaho, 329, 16 Pac. 915.

When parties by stipulation, agree that either party have "60 days after the rendition of the decision" in which to prepare and serve a bill of exceptions, such stipulation is a waiver by both parties of notice of entry of the judgment; and the bill of exceptions must be proposed and served within 60 days from the date of rendition of judgment, unless the time therefor be properly extended.—*Lydon v. Piper* (Idaho), 51 Pac. 101.

The trial court can properly make an order striking from the files a bill of exceptions improperly settled (for the reason that it was proposed and served after the time in which such bill of exceptions could be legally proposed and served had expired) on a proper application made prior to filing transcript on appeal in the appellate court.—*Lydon v. Piper* (Idaho), 51 Pac. 101.

The action of the trial court in striking from the files a bill of exceptions which was proposed and served after the time allowed by law, and after the time stipulated by the parties in which exceptions taken at the trial might be incorporated into a bill of exceptions, and which bill of exceptions was settled by the trial judge the day it was proposed and served, affirmed.—*Lydon v. Piper* (Idaho), 51 Pac. 101.

RECORD ON APPEAL, BILL OF EXCEPTIONS: To entitle a bill of exceptions to be considered in this court, it must be settled and signed by the district judge.—*Meinert v. Snow*, 2 Idaho, 851, 27 Pac. 677.

BILL OF EXCEPTIONS, SETTLEMENT AND SIGNING, SUFFICIENCY: A bill of exceptions, settled and signed by a trial judge, will be treated as such, although it is called a

statement on motion for a new trial.—*United States v. Alexander*, 2 Idaho, 354, 17 Pac. 746.

EXCEPTIONS: When an omission or mistake has occurred in the settlement of a bill of exceptions, the judge may, upon proper application allow a re-settlement thereof, provided that it is asked before the transcript is sent to this court, and the mistake or omission claimed is shown by documentary evidence, or is not denied by the adverse party. But if such omission or mistake rests in the recollection of judge or counsel, and not admitted by the adverse party, a correction or re-settlement should be denied.—*Griffiths v. Montandon* (Idaho), 39 Pac. 195.

APPEAL, REVIEW, SETTLEMENT OF BILL OF EXCEPTIONS: If a bill of exceptions is presented for settlement, after the trial of the cause, and is certified to as correct by respondent's attorneys, and such bill is thereafter settled by the judge and used on the hearing of the motion for a new trial, it is too late for the respondent to raise the objection for the first time in this court that such bill was not settled in time.—*Stufflebeam v. Montgomery*, 2 Idaho, 763, 26 Pac. 125.

APPEAL, BILL OF EXCEPTIONS: Where, in a criminal case, it sufficiently appears, from the bill of exceptions that the venue was proved, and it is conceded that the record contains only a part of the evidence, the objection that the proof of the venue does not affirmatively appear in the bill of exceptions, will not obtain.—*State v. Hendel* (Idaho), 35 Pac. 836.

REVIEW, BILL OF EXCEPTIONS: Where an exception to an order of the court sustaining the motion for judgment on the pleadings is not incorporated into the records by bill of exceptions, an objection that the court erred in sustaining such motion will not be considered on appeal.—*Purdum v. Taylor*, 2 Idaho, 153, 9 Pac. 607.

BILL OF EXCEPTIONS: An error in the instructions of the court to the jury constitutes error at law occurring at the trial, and must have been excepted to and embodied in the bill of exceptions as provided in this section and can not be embodied in an affidavit, or in another bill of exceptions, after the motion for a new trial is denied.—*Railroad Co. v. Superior Court*, 105 Cal. 84, 38 Pac. 627.

The Code does not provide for a statement upon appeal from a judg-

ment, but a party should not be deprived of the fruits of an appeal for designating the document presented as a statement instead of a bill of exceptions.—*Witter v. Andrews*, 122 Cal. 1, 54 Pac. 276.

TIME OF SETTLEMENT: The trial court should refuse to settle a proposed bill of exceptions, which was not prepared within the time allowed by statute, or any authorized extension thereof.—*In re Clary*, 122 Cal. 69, 54 Pac. 368; *Henry v. Merguire*, 106 Cal. 142, 39 Pac. 325. An objection that the bill of exceptions was not presented within time embodied in the record can be considered on appeal.—*Smith v. Jordan*, 122 Cal. 68, 54 Pac. 368.

A trial judge can not be compelled to settle a bill of exceptions after his term of office has expired, but a party desiring to appeal may apply to the supreme court for an order directing its settlement.—*Depeaux v. Peck*, 118 Cal. 523, 50 Pac. 682.

Objections to a defective notice of settlement of a bill of exceptions which failed to specify that the proposed amendments would be presented to the judge with the bill are waived where the bill and amendments was in fact

presented to the judge in the presence of both parties at the time specified, and the hearing was postponed from time to time by consent and no objection was urged prior to the final hearing.—*O'Brien v. O'Brien*, 124 Cal. 422, 57 Pac. 225.

Where different judges act during the progress of a cause, it is the duty of the litigant desiring to have a ruling or decision reviewed upon appeal, to present a bill of exceptions embodying the matters excepted to before one of the judges to the judge who made the ruling or decision for settlement by him, either at the time of the ruling, or after judgment; and, in such case, two or more bills of exceptions may be settled and properly presented for consideration upon appeal.—*Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129.

The certificate of a judge settling an engrossed statement on motion for a new trial does not constitute a special order made after final judgment, and is not an appealable order.—*Henry v. Merguire*, 106 Cal. 142, 39 Pac. 325.

Mandamus will lie to compel a judge to settle and allow a statement on motion for a new trial.—*City of Santa Ana v. Ballard*, 126 Cal. 675, 59 Pac. 133.

Section 3520. Exceptions After Judgment, etc.: Exceptions to any decision made after judgment, may be presented to the judge at the time of such decision and be settled or noted as provided in Section 3518, and a bill thereof may be presented and settled afterwards, as provided in Section 3519, and within like periods after entry of the order upon appeal from which such decision is reviewable

1887 R. S. Sec. 4431.

Section 3521. Exception Refused, Application to Supreme Court: If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same. The application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill when proven, must be certified by a justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause.

1887 R. S. Sec. 4432.

PRACTICE, PETITION: Draft of the proposed bill of exceptions must

accompany petition, or some exhibit showing exceptions.—*Denham v. Lieut. Allen* (Idaho), 43 Pac. 74.

Section 3522. Proceedings where Judge Ceases to Hold Office, etc: When the decision excepted to was made by any judicial officer other than a judge, the bill of exceptions shall be presented to such judicial officer and be settled and signed by him, in the same manner as it is required to be presented to, settled and signed by a court or judge. A judge or judicial officer may settle

and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the State, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may, by its order or rules, direct. Judges, judicial officers, and the supreme court shall respectively possess the same power, in settling and certifying statements as is by this Section conferred upon them in settling and certifying bills of exceptions.

1887 R. S. Sec. 4433.

CHAPTER CXLVIII.

NEW TRIALS.

Section.

3523. New trial defined.

3524. When new trial may be granted.

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Section.

3527. Motion, when to be heard.

3528. What constitutes record to be used on appeal.

3529. New trial by order of the court.

3530. Motion, when may be heard.

Section 3523. New Trial Defined: A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court or by referees.

1887 R. S. Sec. 4433.

Probate matters, grounds and procedure for new trial the same: Sec. 4318.

Mandamus proceedings, new trial in court where facts tried: Sec. 3776.

NEW TRIAL, ORIGINAL PROCEEDING IN SUPREME COURT:

Motion for a new trial is not a proper proceeding in the supreme court to obtain a rehearing on an issue of law, when said court is proceeding under its

original jurisdiction.—*People v. George*, 2 Idaho, 848, 27 Pac. 680.

A motion for a new trial is not an appropriate proceeding to review the action of a court in taking judgment when there has been no trial upon an issue of fact, as where the answer of the defendant has been struck out, and judgment entered against him as for want of an answer.—*Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147.

Section 3524. When New Trial may be Granted: The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

2. Misconduct of the jury; and when any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise, which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;

5. Excessive damages, appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;

7. Error in law, occurring at the trial, and excepted to by the party making the application.

1887 R. S. Sec. 4439.

Errors and defects not affecting substantial rights, disregarded; judgment not reversed by reason thereof: Sec. 3243.

Sub. 1. DENIAL OF CONTINUANCE: On a motion for a new trial, on the ground that the court denied a continuance, the moving party should procure the affidavits of the absent witnesses showing that they can testify to the facts sought to be proved; or show sufficient reason for not obtaining such affidavits.—*Lillienthal & Co. v. Anderson*, 1 Idaho, 673.

EXAMINATION OF JUROR PRECLUDED, NEW TRIAL: Where the record shows that a party was precluded from examining a juror for cause, and no examination of the juror was held, but he was allowed to serve, held, that a substantial right of the party was denied, for which a new trial will be granted.—*United States v. Alexander*, 2 Idaho, 354, 17 Pac. 746.

MISTAKE IN TELEGRAM FROM JUDGE: A mistake in the transmission of a telegram by the judge of the court, for which the party is no way responsible, and whereby a party is deprived of a hearing upon the trial of a cause, is sufficient ground for vacating a judgment.—*Thum v. Ogden Sav. Bank (Intervener)*, (Idaho), 55 Pac. 864.

IMPROPER CONDUCT OF A PARTY: A judgment in favor of a party guilty of improper conduct, calculated to influence the jury, or any part thereof in his favor in rendering the verdict, should be reversed, and a new trial granted on the ground of public policy.—*Burke v. McDonald*, 2 Idaho, 1022, 29 Pac. 98.

MISCONDUCT OF SUITOR: A judgment in favor of a party guilty of improper conduct calculated to influence the jury or any juror in their favor, should be reversed and a new trial granted on the ground of public policy.—*Palmer v. Utah Northern Railway Co.* 2 Idaho, 290, 13 Pac. 425.

Sub-division 2, Section 4439, is not punctuated the same as the corresponding provision is punctuated, in the Code of Civil Procedure of California; but the change was made by the printer, and not by the legislature or Code Commission.—*Griffiths v. Montandon* (Idaho), 39 Pac. 548.

AFFIDAVIT OF JUROR: The ver-

dict of a jury may not be impeached by the affidavit of a juror.—*Jacobs & Co. v. Dooley & Co.* 1 Idaho, 41.

SAME, WHEN COMPETENT: Affidavits of jurors, under the provisions of Sub-division 2, Section 4439, Rev. St. can not be received for the purpose of impeaching their verdict, unless it is a verdict obtained by a resort to the determination of chance.—*Griffiths v. Montandon* (Idaho), 39 Pac. 548.

Affidavit competent to show verdict was reached by resort to chance.—*Griffin v. City of Lewiston* (Idaho), 55 Pac. 545.

GAMBLING, VERDICT: Where a jury agree that each member thereof shall mark the sum which he thinks the plaintiff is entitled to recover, on a slip of paper, and then ascertain by addition the amount of the sums so marked, and then divide said amount by 12 (the number of jurors), and that the quotient resulting from such division shall be the amount of the verdict, such verdict is obtained by "resort to a determination of chance," within the meaning of that term, as used in Sub-division 2, Section 4439, Rev. St. 1887.—*Flood v. McClure* (Idaho), 32 Pac. 254; see also *Griffin v. City of Lewiston* (Idaho), 55 Pac. 545.

Sub. 3. SURPRISE, EVIDENCE OF: On a motion for a new trial, on the grounds that the party was taken by surprise by reason of one of his own witnesses failing to testify to a material fact, which the witness had previously stated in the presence of others he could testify to, the affidavits of the persons in whose hearing such statements were made are the best evidence of the surprise, and should be produced. *Lillienthal & Co. v. Anderson*, 1 Idaho, 673.

Sub. 4. CUMULATIVE EVIDENCE: New evidence to a subordinate point or particular fact before gone into is cumulative, or additional as to that fact.—*Flannagan v. Newberg*, 1 Idaho, 78, quoting *Aitken v. Bennis*, 3 Wood & M. 348.

EVIDENCE IRRELEVANT TO ISSUE, NEW TRIAL, NEWLY DISCOVERED EVIDENCE: Error can not be predicated on the refusal of the court to grant a new trial on the ground of newly discovered evidence when it appears that the alleged evidence is entirely irrelevant to the issues made by

the pleadings.—*Gaffney v. Hoyt*, 2 Idaho, 184, 10 Pac. 34.

EVIDENCE LIKELY TO CHANGE RESULT: If the newly discovered evidence brings to light some new fact bearing upon the main question at issue, and would be likely to change the result, a new trial should be granted.—*Flannagan v. Newberg*, 1 Idaho, 78.

Sub. 5. PRESUMPTION: A jury is presumed to have found its verdict upon the facts, without having been influenced by passion or prejudice, and where a verdict is for a less sum than the full amount demanded in the prayer of the complaint, this presumption is strengthened. That a jury has been influenced by passion or prejudice, must be made to appear affirmatively.—*Cox v. Northwestern Stage Company*, 1 Idaho, 376.

Sub. 6. CONFLICT OF TESTIMONY: The appellate court will not disturb a judgment, or verdict, or finding, or order denying a new trial, or granting a new trial where there is a substantial conflict of testimony and no law appears to have been violated. The appellate court will not attempt to weigh the evidence and decide between conflicting statements; but it will always review the evidence, if the point is made that the verdict or judgment is contrary to the evidence.—*Monarch G. & S. M. Co. v. McLaughlin*, 1 Idaho, 617.

WEIGHT OF EVIDENCE: When there is some evidence to sustain each of the material questions, upon which a jury is bound to find in order to support a verdict, this court ought not to disturb it, even if the court would have found differently on any, or all of the issues.—*Cox v. Northwestern Stage Company*, 1 Idaho, 376.

EVIDENCE, CONFLICT: The appellate court will not disturb a judgment, or verdict, or order denying a new trial, where there is a substantial conflict in the testimony and no rule of law appears to have been violated.—*Mootry v. Hawley*, 1 Idaho, 543.

DEPOSITIONS, CONTRARY RULE: When the appellate court finds upon a review that there is a substantial conflict of testimony, it will not disturb the decision of the court below refusing a new trial. If the testimony consists wholly of depositions, the rule is different, but not when a considerable portion is oral.—*Ainslee v. Idaho World Printing Co.* 1 Idaho, 641.

QUESTIONS FOR THE JURY: When, from the entire evidence, different minds might reach different conclusions as to the sale and acceptance of the property claimed to have been sold, the sale and acceptance are questions for the jury, and their verdict will not be disturbed when submitted to

them under proper instructions.—*Coffin et al. v. Bradbury* (Idaho), 35 Pac. 715.

VERDICT, CONFLICT OF EVIDENCE, APPEAL: Where there is a substantial conflict in the evidence, the verdict of a jury will not be disturbed by the appellate court, unless it is plainly contrary to the decided weight of evidence.—*Hawkins v. Pocatello Water Co. Limited* (Idaho), 35 Pac. 711.

Where the evidence is simply contradictory, the appellate court will not disturb a verdict.—*Van-Hook et al. v. West* (Idaho), 32 Pac. 1133.

EVIDENCE HELD INSUFFICIENT: Evidence in this case examined and held not to support the judgment.—*Kelly v. Railroad Co.* (Idaho), 38 Pac. 404, distinguished; *Jones v. Oregon Short Line R. Co.* (Idaho), 56 Pac. 77.

APPEAL WITHIN SIXTY DAYS: The exception that the verdict is not supported by the evidence can not be reviewed unless the appeal is taken within 60 days after the rendition of judgment.—*Holt v. Spokane & P. Ry. Co.* (Idaho), 35 Pac. 39.

"VERDICT AGAINST LAW," CONSTRUCTION: The statute, in authorizing a new trial, on the ground that the "verdict is against law," does not intend to include in that ground all or any of the other separate grounds enumerated in Section 4439, Rev. St. 1887.—*Young v. Tiner* (Idaho), 38 Pac. 697.

INSUFFICIENCY OF EVIDENCE, JUDGMENT CONTRADICTORY TO LAW: Insufficiency of evidence to justify the judgment and objection to the judgment as being contradictory to law, are not grounds upon which a motion for a new trial can be granted.—*Curtis v. Walling*, 2 Idaho, 383, 18 Pac. 54.

NEW TRIAL, GENERAL RULES, DISCRETION OF COURT: Motions for a new trial are addressed to the sound discretion of the court, and are granted or denied, not as a matter of strict right, but as the substantial justice of the case may appear to require.—*Monarch G. & S. M. Co. v. McLaughlin*, 1 Idaho, 650.

PRESUMPTION: On motion for new trial, or on appeal, every intendment is in favor of the judgment, or ruling of a court of record. The party complaining must show error affirmatively.—*Hazard v. Cole*, 1 Idaho, 276.

ERROR, INJURY THEREBY: Where error is shown it is presumed to have worked injury to the party against whom it was committed, unless it affirmatively appears from the record that no injury did or could result.—*Holt v. Spokane & P. Ry. Co.* (Idaho), 35 Pac. 39.

FINDINGS, TIME OF FILING: It is not ground for a new trial that the

findings were not filed until after the adjournment of the term of court.—*Hazard v. Cole*, 1 Idaho, 276.

ISSUE, SOLELY OF FACT, TWO CONCURRING VERDICTS: The general rule is, where the issue is solely of fact, that after two concurring verdicts the court will not grant a new trial, if the questions to be tried wholly depend upon matters of fact and no rule of law has been violated, although the verdict be against the weight of evidence.—*Monarch G. & S. M. Co. v. McLaughlin*, 1 Idaho, 650.

Sub. 1. NEW TRIAL, ABSENCE OF JUDGE FROM COURT ROOM: The fact that during the trial of a criminal case the judge of the court absented himself from the court room, so as to be out of sight and hearing of the proceedings going on therein, is ground for a new trial.—*People v. Tupper*, 122 Cal. 424, 55 Pac. 125, 68 Am. St. Rep. 44.

The accidental absence of counsel when the verdict is received, if not due to any action on the part of the court, or of the opposing counsel or parties, is not ground for the reversal of the judgment.—*Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665.

Changing sides by an attorney at law who has represented one of the litigants at a former trial of the cause ought not to be permitted by the court; and if permitted, this is an irregularity on account of which a new trial should be granted.—*Weidenkind v. Tuolumne Water Co.* 74 Cal. 386, 19 Pac. 173, 5 Am. St. Rep. 445.

Sub. 2. Gambling verdicts are irregular and will be set aside, e. g. when each member, for the purpose of arriving at a verdict, agrees to set down a sum according to his own judgment, divide the aggregate sum by twelve, and return the quotient as their verdict, and does so return such a verdict. Verdict of jury may be determined by average, or other similar means, provided the jurors agree upon such sum, after it is found, as their verdict; but they must not previously be bound by the contingent result, and must reserve to themselves the right to dissent therefrom.—*Wilson v. Perryman*, 5 Cal. 44, 63 Am. Dec. 68; see also *Turner v. Tuolumne County Water Co.* 25 Cal. 400; *Goodman v. Cody*, 1 Wash. Tr. 330, 34 Am. Rep. 809; *Gordon v. Trevarthan*, 13 Mont. 393, 34 Pac. 185, 40 Am. St. Rep. 458; *Hilton v. Southwick*, 35 Am. Dec. 260 and note; *Monroe v. State*, 76 Am. Dec. 66 and note; *Sawyer v. Railroad Co.* 90 Am. Dec. 390 and note; *Goodman v. Cody*, 34 Am. Rep. 816 and note; *Sulleno v. Railway Co.* 7 Am. St. Rep. 507 and note; *Richardson v. Coleman*, 31 Am. St. Rep. 432 and note; *Dixon*

v. Pluns, 98 Cal. 384, 33 Pac. 268, 55 Am. St. Rep. 180 and note; *McDonnell v. Pescadero Stage Co.* 120 Cal. 476, 52 Pac. 725.

The affidavit of a juror can not be received to impeach the verdict, except in the single case of a resort to a determination by chance; and it is not admissible to prove that the jury were guilty of misconduct by reading newspaper reports of the trial, either by the affidavit of a juror, or by the affidavits of other parties as to statements made by the jurors.—*People v. Azoff*, 105 Cal. 632, 39 Pac. 59. But the affidavit of a juror may be received to attack his verdict under Sub. 2 of this section if such affidavit shows a resort to the determination of chance.—*Gordon v. Trevarthan*, 13 Mont. 387, 34 Pac. 185, 40 Am. St. Rep. and note; see also *McDonnell v. Pescadero Stage Co.* 120 Cal. 476, 52 Pac. 725.

A juror's affidavit impeaching his verdict in an equity case is properly disregarded, when the verdict is merely advisory.—*Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665.

MISCONDUCT OF JURY: During a murder trial, lasting eleven days, large quantities of beer, wine and whisky were ordered by the jury, at their own expense, and consumed by them, mostly before the submission, but some afterwards, without permission of the court and without the knowledge of the defendant. It did not clearly appear that any juror was intoxicated. Held, that a conviction must be set aside.—*People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549.

Treating of jurors by the prevailing party is sufficient to authorize the setting aside of the verdict. The burden of proving the act was not intended or did not influence the juror is upon the offending party, but the showing that the adverse party was present and accepted an invitation to drink with the juror may estop him from objecting to the misconduct.—*Bradshaw v. Degenhart*, 15 Mont. 267, 39 Pac. 90, 48 Am. St. Rep. 677.

Sub. 3. Surprise is not ground for new trial when based upon ignorance of law.—*Fuller v. Hutchings*, 10 Cal. 523, 70 Am. Dec. 746.

Judgment will not be set aside, nor new trial granted, on the ground of surprise, when from the applicant's own showing it appears that if he had not been taken by surprise, the result would not have been different, or that the result of a second trial will be different.—*McClusky v. Gerhauser*, 2 Nev. 47, 90 Am. Dec. 512.

A party who does not make an effort to subpoena his witnesses until the day of the trial, and then leaves his subpoenas upon the desk of the clerk, who

neglects to serve them, does not use due diligence, and a new trial will not be granted because of the absence of said witnesses.—*Rogers v. Huie*, 1 Cal. 429, 54 Am. Dec. 300. The refusal of the court to grant a new trial upon the ground of surprise is not an abuse of discretion where plaintiff is mistaken as to the terms of a lease in his possession and offered in evidence by him in the cause.—*Borderre v. Den*, 106 Cal. 601, 39 Pac. 946.

Sub. 4. New trial will not be granted on ground of newly discovered evidence when such evidence will not change the result.—*McClusky v. Gerhauser*, 2 Nev. 47, 90 Am. Dec. 512.

Where the newly discovered evidence is cumulative, and the court determines that the evidence, if true, would most probably not change the result the motion should be denied.—*Shafer v. Willis*, 124 Cal. 41, 56 Pac. 635.

It seems that, if a showing is made upon motion for a new trial, which satisfies the statute respecting "newly discovered evidence material for the party making the application, and which he could not, with reasonable diligence, have discovered and produced at the trial," the moving party is entitled to a new trial; and the court has no discretion to try the issues of fact presented by the matter of the newly discovered evidence upon counter-affidavits addressed to such issue; but its discretion in determining facts presented by conflicting affidavits is limited to questions pertinent to the motion, other than the issue of fact, to which the newly discovered evidence is addressed.—*Shafer v. Willis*, 124 Cal. 41, 56 Pac. 635.

Sub. 5. **EXCESSIVE DAMAGES:** When the amount of damages awarded in an action for negligence is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury, the verdict will be set aside as excessive. A verdict of twenty thousand dollars, in an action by a mother for the death of her daughter, two years old, alleged to have been caused by the negligence of the defendant, will be set aside as excessive, especially where the complaint alleges no special damage, and no evidence whatever is introduced or offered upon the subject of damage.—*Morgan v. Southern Pacific Co.* 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143 and note: see also *Redfield v. Oakland C. S. Ry. Co.* 110 Cal. 286, 42 Pac. 822.

A verdict for the plaintiff for twenty-five thousand dollars, in an action for the seduction of a chaste young girl by a married man of wealth and mature years, can not be said to be excessive, and will not be reversed upon appeal

upon that ground.—*Marshall v. Taylor*, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144 and note.

If the evidence tends to prove that after a passenger has surrendered his ticket, the conductor denied that fact, and demanded the payment of addition fare, and being refused, grabbed the passenger suddenly by the coat collar, shoved him out of the door, pulled him to the platform, and shoved him down the steps, a verdict awarding five hundred dollars damages can not be regarded as excessive, nor as indicating that the jury acted under the influence of passion or prejudice.—*Gorman v. Southern Pacific Co.* 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157 and note.

LIABILITY OF OWNER FOR INJURIES INFLICTED BY ANIMALS: A verdict in favor of plaintiff for five thousand five hundred dollars for injuries suffered by him can not be held excessive, when evidence showed that his coccyx was fractured, the muscles of the region atrophied, the sciatic nerve tender and painful to pressure, with other symptoms of spinal injury.—*Clowdis v. Fresno Flume and Irrigation Co.* 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238 and note.

Sub. 6. A verdict is so far opposed to the evidence as to justify a new trial, where in a trial in an action of ejectment, upon a question of boundary, the testimony of five unimpeached witnesses stood opposed to the description contained in a deed to which one of the parties was a stranger, and the verdict found the fact as recited in the deed.—*Franklin v. Dorland*, 28 Cal. 175, 87 Am. Dec. 111.

An order granting a new trial will not be disturbed, where one of the grounds of the motion is insufficiency of the evidence to justify the verdict, if it can not be said that the court abused its discretion in granting the motion on that ground.—*Anglo-Nevada, Etc. Corp. v. Ross*, 123 Cal. 521, 56 Pac. 335.

Verdict will not be set aside as contrary to evidence, when there are several distinct defenses, each of which is sufficient to defeat the action, and the verdict is general and supported by the evidence as to one of the defenses, though not so as to all the others.—*Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472.

New trial, insufficiency of evidence how specified in statement.—*De Molera v. Martin*, 120 Cal. 545, 52 Pac. 825.

Sub. 7. New trial will not be granted on the ground that the court erroneously permitted the respondent to introduce evidence upon a matter not denied in the answer, if the appellant was not prejudiced thereby.—*Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102.

Section 3525. On what Papers Moved: When an application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last Section it must be made upon affidavits; for any other cause it may be made at the option of the moving party either upon the records, and files in the action, or the minutes of the court or a bill of exceptions, or a statement of the case prepared as hereinafter provided.

1887 R. S. Sec. 4440.

Allegation on motion for new trial on the ground of surprise must be supported by an affidavit of the facts and show due diligence.—*May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135; see also *The Livestock G. P. Co. v. Union, Etc. Co.* 114 Cal. 450, 46 Pac. 286.

for upon the ground of surprise or newly discovered evidence, the party must in his affidavit set forth such evidence clearly and explicitly, and if possible procure the affidavits of the parties whose testimony would constitute such new evidence.—*Rogers v. Huie*, 1 Cal. 429, 54 Am. Dec. 300.

In all cases where new trial is moved

Section 3526. Notice: Motion, Statement, Procedure Upon Application: The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action was tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits, or the records and files in the action, or the minutes of the court or a bill of exceptions, or the statement of the case;

1. If the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof may allow, file such affidavits with the clerk and serve a copy upon the adverse party, who shall have ten days to file counter affidavits, a copy of which must be served upon the moving party;

2. If the motion is to be made upon a bill of exceptions, and no bill has already been settled as hereinbefore provided, the moving party shall have the same time after service of the notice to prepare and obtain a settlement of a bill of exceptions, as is provided after the entry of judgment or after receiving notice of such entry by Section 3519, and the bill shall be prepared and settled in a similar manner. If a bill of exceptions has been already settled and filed, when the notice of motion is given, such bill shall be used on the motion;

3. If the motion is to be made on a statement of the case, the moving party must, within ten days after the service of the notice, or such further time as the court in which the action is pending, or the judge thereof may allow, prepare a draft of the statement, and serve the same, or a copy thereof upon the adverse party.

If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto, and serve the same or a copy thereof, upon the moving party. If the amendments be adopted, the statements shall be amended accordingly and then presented to the judge, who tried or heard the cause, for settlement, or be delivered to the clerk of the court for the

judge. If not adopted, the proposed statement and amendments shall, within ten days thereafter, be by the moving party delivered to the clerk of the court for the judge and thereupon the same proceedings for the settlement of the statement shall be taken by the parties, and clerk and judge, as are required for the settlement of bills of exception by Section 3519. If the action was heard by a referee, the same proceedings shall be had for the settlement of the statement by him as are required by that Section for the settlement of bills of exception by a referee. If no amendments are served within the time designated, or, if served are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee for settlement without notice to the adverse party. When the notice of the motion designates as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient.

When the notice designates as the ground of the motion, errors in law occurring at the trial and excepted to by the moving party, or deemed excepted to, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion. It is the duty of the judge or referee in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement. When settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed and shall then be filed with the clerk;

4. When the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion be errors in law occurring at the trial, and excepted to by the moving party, or deemed excepted to, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied.

1887 R. S. Sec. 4441.

Bill of exceptions, settling: Sec. 3519.

Proceedings for settlement of statement where judge, removed, dead or absent from state: Sec. 3522.

Minutes of court, motion on, statement, certificate of judge: Sec. 3528.

WAIVER: A failure to give notice of intention to move for new trial, or to file a statement within the time required by law, or such further time as the court or judge may, by order, grant, is a waiver of the right to move for a new trial; and the failure can only be remedied by the appearance of the

opposite party without objection to such defects, at the settlement of the statement, or on the hearing of the motion.—*Stevens v. Northwestern Stage Company*, 1 Idaho, 604.

PRESUMPTION: In case the parties can not agree upon the statement, notice must be given for a settlement before the court, or judge, by the party proposing the statement, but it must affirmatively appear that no notice was given, or this court will presume that it was given.—*Stevens v. Northwestern Stage Company*, 1 Idaho, 604.

ORDER STAYING EXECUTION. EXTENDING TIME: An order "that

there be a stay of execution on the judgment in this case for a period of twenty days for the purpose of allowing the defendant to move for a new trial," is not an order extending the time for giving notice of intention to move for a new trial, or for filing a statement.—*Stevens v. Northwestern Stage Company*, 1 Idaho, 604.

SETTLEMENT OF STATEMENT, PRACTICE: The statement on a motion for a new trial must be settled, before a decision on the motion, in order that the court below, or the judge thereof, may have something definite and certain to act upon.—*Stevens v. Northwestern Stage Co.* 1 Idaho, 604.

SERVICE OF STATEMENT, CO-RESPONDENT: Co-respondents can not take advantage of failure of appellant to serve statement on motion for a new trial on one of their co-respondents, such co-respondent having failed to do so.—*Wilson v. Wilson* (Idaho), 57 Pac. 708.

STATEMENT, CERTIFICATE OF JUDGE: A statement on a motion for a new trial can only become a part of the record by the certificate of the judge or referee, who directed the case.—*Hyde v. Harkness*, 1 Idaho, 623.

SERVICE, NOTICE MOTION FOR NEW TRIAL: A notice of intention to move for a new trial must be served upon all adverse parties including co-defendants whose interests may be adversely affected by the granting of a new trial.—*United States v. Crooks*, 116 Cal. 45, 47 Pac. 870; see also *Moore v. Kendall*, 121 Cal. 146, 53 Pac. 647.

But upon an appeal from an order denying a new trial, only the parties to the motion upon which the order was made are necessary parties to the appeal.—*Herriman v. Menzies*, 115 Cal. 26, 44 Pac. 660 and 46 Pac. 730.

The right to move for a new trial is statutory and when the notice of intention to move for a new trial is not served within the time prescribed the right to so move is lost.—*California Imp. Co. v. Baroteau*, 116 Cal. 138, 47 Pac. 1018; see also *Henry v. Merguire*, 106 Cal. 145, 39 Pac. 599.

A motion for a new trial can not be considered when the notice of intention does not state what the motion will be based upon.—*Hughes v. Alsip*, 112 Cal. 590, 44 Pac. 1027.

Moving party should specify in statement on motion for new trial on ground that the findings of fact are against the evidence, each particular finding of fact which in his opinion is against the evidence.—*Le Roy v. Rogers*, 30 Cal. 229, 89 Am. Dec. 88; see also *Smith v. Smith*, 119 Cal. 186, 48 Pac. 730 and 51

Pac. 183; *Leonard v. Shaw*, 114 Cal. 71, 45 Pac. 1012.

As to insufficient specification of errors.—*Hall v. Susskind*, 120 Cal. 566, 53 Pac. 46.

The sufficiency of the evidence to sustain any particular finding can not be question under a general specification that "there was no evidence which proved or tended to prove that the plaintiff at any time complied with or performed all the conditions or any of the conditions of the contract of insurance by him to be performed."—*Menk v. Home Insurance Co.* 76 Cal. 51, 14 Pac. 837 and 18 Pac. 117, 9 Am. St. Rep. 158; *Haight v. Tryon*, 112 Cal. 7, 44 Pac. 318; *Kumle v. Grand Lodge A. O. U. W.* 110 Cal. 213, 42 Pac. 634.

A statement on motion for new trial signed by the judge, and appearing, from the minutes of the court, to have been used on the hearing of the motion, is sufficiently authenticated. The statute points out no mode of authentication, and any satisfactory evidence in the record, in some legitimate and proper form, that the statement has been examined and approved by the judge is sufficient.—*Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472.

Papers used on motion for new trial must be identified as having been used on such motion and filed in trial court.—*Whipple v. Hopkins*, 119 Cal. 351, 51 Pac. 535; *Wells v. Kreyenhagen*, 117 Cal. 331, 49 Pac. 128, and must be authenticated as part of the record.—*Ackley v. Fishbeck*, 124 Cal. 410, 57 Pac. 207; *Sprigg v. Barber*, 122 Cal. 577, 55 Pac. 419; *Leonard v. Shaw*, 114 Cal. 69, 45 Pac. 1012; *Stickney v. Hanrahan* (Idaho), 63 Pac. 159.

Stipulation between attorneys for plaintiff and defendant that annexed statement is a correct statement on motion for new trial, that upon it plaintiff's motion for a new trial was refused, also that it contains the judgment roll, orders and instructions given by the court, and shall be used on appeal without further certificate of identification, cures all technical objections to the transcript; and where no notice of motion for new trial appears, the court will presume that one was regularly given.—*Godchaux v. Mulford*, 26 Cal. 316, 85 Am. Dec. 178.

MOTION ADDRESSED TO DISCRETION OF COURT: A motion for a new trial, on the ground of the insufficiency of the evidence to justify the verdict or other decision is addressed to the sound legal discretion of the trial court.—*Warner v. Thomas, Etc. Works*, 105 Cal. 412, 38 Pac. 960; *Miller v. Hunt* (Idaho), 63 Pac. 803.

Section 3527. Motion, when to be Heard; The appli-

cation for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavits, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing upon motion of either party. On such hearing reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions, documentary evidence, and stenographic report of the testimony on file.

1887 R. S. Sec. 4442.

Motion for new trial may be heard at chambers: Sec. 3028.

New trial, appeal to supreme court from order refusing within what time: Sec. 3573.

Where motion is made upon minutes of the court without statement, upon reference to dispositions and stenographic reports, subsequent statement should be settled before appeal: Sec. 3528.

Service of hearing of motions, generally: Chap. CLXVII.

Manner of service of notice and papers generally: Chap. CLXVIII, Secs. 3711 to 3717.

Sufficiency of complaint may be considered on motion for a new trial if the defendant moved for a non-suit in the trial court on the ground that the contract set out in the complaint was against public policy, and the motion was denied.—*Alpers v. Hunt*, 86 Cal. 73, 24 Pac. 846, 21 Am. St. Rep. 17; see also *Railroad Co. v. Superior Court*, 105 Cal. 84, 38 Pac. 627; *Stickney v. Hanrahan* (Idaho), 63 Pac. 159.

Section 3528. What Constitutes Record to be Used on Appeal: The judgment roll and the affidavits, or the records and files in the action, or bills of exceptions, or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the court, and in that case the judgment roll and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal. Such subsequent statement shall be proposed by the party appealing, or intending to appeal, within ten days after the entry of the order, or such further time as the court in which the action is pending, or a judge thereof, may allow and the same, or a copy thereof be served upon the adverse party, who shall have ten days thereafter to prepare amendments thereto, and serve the same or a copy thereof, upon the party appealing, or intending to appeal; and thereafter proceedings shall be had, and within like periods, for the settlement of the statement, as provided by Section 3526, but the statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them; and it shall be the duty of the judge to exclude all other evidence or matter from the statement.

1887 R. S. Sec. 4443.

Judgment roll: Sec. 3509.

New trial, appeal to supreme court from order refusing, within what time: Sec. 3573.

APPEAL, EXCEPTIONS, RULING ON EVIDENCE: Under Code, Section 653, providing that a statement once made may be used on appeal from the judgment, exceptions to rulings on evidence embodied in a statement of the

case may be considered on appeal from the judgment where it appears that such had been used at the hearing on the motion for a new trial.—*Pradbury v. Idaho & O. Land Co.* 2 Idaho, 221, 10 Pac. 620.

APPEAL, TRANSCRIPT, MATTERS INCLUDED: Nothing in a transcript brought to the appellate court can be considered, unless by provisions of the statute or the order of the judge, it is made a part of the record of the case.

Of what the record consists considered.—*Ramsay v. Hart*, 1 Idaho, 423.

STATEMENT OR EXCEPTIONS, REVIEW: Exceptions taken during the trial to the rulings of the trial court, may be settled and saved in accordance with the provisions of Section 4426, Rev. St. or they may be settled after the trial, in accordance with Section 4430, Rev. St. or in statement on motion for new trial, and when so settled and saved will be reviewed by supreme court, on appeal.—*Rumpel v. Oregon Short Line & U. N. Ry. Co.* (Idaho), 35 Pac. 700.

RECORD INCOMPLETE, EVIDENCE, REVIEW: Where a record of appeal does not contain all the evidence adduced in the court below, an objection that the finding of fact is not supported by the evidence, will not be sustained.—*Riborado v. Quong Pang Mining Co.* 2 Idaho, 131, 6 Pac. 125.

APPEAL, REVIEW, DEFECTIVE RECORDS: Where the record on appeal does not contain the evidence adduced in the trial court an objection that the finding of fact is not supported by the evidence will not be sustained.—*Toulouse v. Burkett*, 2 Idaho, 170, 10 Pac. 26.

APPEAL FROM JUDGMENT, REVIEW: On appeal from the judgment only, where it does not appear that a motion for a new trial was made, or that any settlement was filed pursuant to Rev. St. Idaho, Sec. 4443, the judgment only can be considered.—*Washing & I. R. R. Co. v. Osborne*, 2 Idaho, 527, 21 Pac. 421.

APPEAL FROM JUDGMENT, USE OF STATEMENT: A statement used on motion for a new trial, and made part of the judgment roll, may be used on appeal from the judgment, if not taken within 60 days after the rendition thereof, for the purpose of determining whether the trial court made any errors in law during the progress of the trial.—*Young v. Tiner* (Idaho), 38 Pac. 697.

RECORD MUST SHOW ERROR: When the record does not show the grounds upon which a new trial was granted, and no error warranting a new trial is apparent from the record, the order granting a new trial will be reversed.—*Lowe v. Long* (Idaho), 47 Pac. 93.

AFFIRMED UNLESS ABUSIVE DISCRETION: When it appears from the record that, in granting an order for a new trial, the district court has committed no abuse of discretion, such order will not be disturbed.—*Jacksha v. Gilbert* (Idaho), 44 Pac. 555.

SAME: An order granting a new trial will not be reversed on appeal unless it is made to appear that there has been a manifest abuse of discretion in granting a new trial.—*Brossard v. Morgan* (Idaho), 56 Pac. 163.

Judgment roll, appeal in probate proceedings.—*In re Ryer*, 110 Cal. 556, 42 Pac. 1082.

Section 3529. New Trial by Order of the Court:

The verdict of a jury may also be vacated, and a new trial granted by the court, in which the action is pending, on its own motion, without the application of either of the parties, when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion, or prejudice. The order of the court may be reviewed on appeal in the same manner as orders made on motions for a new trial, and a statement to be used on such appeal may be prepared in the same manner as statements after a motion is heard upon the minutes of the court, as provided in Section 3528.

1887 R. S. Sec. 4444.

Section 3530. Motion, when may be Heard: The motion for a new trial may be brought to a hearing before the judge who tried or heard the case, at chambers or in open court, in any county of the State.

1887 R. S. Sec. 4445.

CHAPTER CXLIX.

EXECUTION.

Section.

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ISSUANCE, REQUIREMENTS AND FORM OF.

Section 3531. Within what Time Execution may Issue: The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.

1887 R. S. Sec. 4470.

An execution, other than for the recovery of money, may be enforced after five years, by leave of the court, on motion: Sec. 3535.

Execution, forcible entry and detainer, where term of lease has not expired defendant may pay judgment within five years after rendition, which satisfies judgment and writ of restitution can not issue: Sec. 3990.

Order for payment of money made by judge on motion, may be enforced in like manner as a judgment: Sec. 3710.

Mandamus proceedings, execution for damages and costs may issue: Sec. 3779.

Execution, judgment, election contest: Sec. 3814.

Execution against administrator for dividend: Sec. 4265.

Execution for supreme court costs on appeal, issues from district court same as on judgment. Memorandum, party

filing in 30 days after filing remittitur: Sec. 3732.

Execution, not against estate, certified copy of judgment to probate court: Secs. 4146 and 4150.

But if levy actually made before death, same may be completed: Sec. 4151.

Execution can not be issued against state and county. Costs are paid by treasurer. Drawing warrant for the same: Secs. 3736 and 3737.

Appeal, stay of execution: Secs. 3576 to 3579.

STAY OF EXECUTION, UNDERTAKING: An undertaking placed on file to stay the execution of a judgment although the jurat to the affidavit of justification is not signed by the officer administering the oath to the sureties, if sufficient in other respects, will stay the issuance of execution thereon; and if the clerk issued execution, it should be quashed by the district court on mo-

tion.—*Miller v. Pine Min. Co. (Idaho)*, 32 Pac. 207.

The time within which an execution may issue is not extended by an order staying proceedings.—*Cortez v. Superior Court*, 86 Cal. 274, 24 Pac. 1011, 21 Am. St. Rep. 37.

The fact that the powers of an administrator whose duty it was to cause an order of sale to be issued were suspended for a part of the time can not have the effect of suspending the running of the statute limiting the time within which such order can be issued.—*Dorland v. Hanson*, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 44.

This section limiting the time within which an execution can issue to five years after the entry of the judgment, applies as well to a decree foreclosing the lien of a street assessment, and an order of sale thereunder, as to a personal judgment for the recovery of money and an execution thereon.—*Dorland v. Hanson*, *Id.* But in an action of divorce, a decree for alimony, payable at successive intervals, charged as a lien upon the real estate of the husband, such real estate may be sold to satisfy the lien for any unpaid installments accruing after the expiration of five years from the entry of the judgment as the right to an execution for these installments does not accrue until they respectively fall due.—*Gaston v. Gaston*, 114 Cal. 542, 46 Pac. 609, 55 Am. St. Rep. 86.

An order directing execution to issue after the lapse of time within which the statute declares it may be issued is in excess of the jurisdiction of the court.—*Cortez v. Superior Court*, 86 Cal. 274, 24 Pac. 1011, 21 Am. St. Rep. 37.

Where a judgment debtor delivers to the judgment creditor a promissory note

of a third person in satisfaction of the judgment, which is void because fraudulently obtained by the judgment debtor from the payors, it is unnecessary for the judgment creditor to return the note before enforcing his judgment by execution.—*Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151.

The execution of a void judgment will be stayed by the court. Courts will not permit their process to be abused by attempts thereunder to enforce void judgments.—*People v. Greene*, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448.

An execution may be quashed on the ground that the amendment of judgment by which the execution of the judgment was authorized was void.—*Scamman v. Bonslett*, 118 Cal. 93, 62 Am. St. Rep. 226, 50 Pac. 272.

To preserve the priority of the judgment lien under the provisions of Section 3510, ante, not only must the execution be issued but the levy and sale completed within two years.—*Isaac v. Swift*, 10 Cal. 71, 70 Am. Dec. 698; *Bagley v. Ward*, 37 Cal. 133; *England v. Lewis*, 25 Cal. 351; *Myers v. Mott*, 29 Cal. 372.

The issuance of an order of sale before the taxation of costs is not premature and an appeal taken after the taxation of costs from an order refusing to vacate the order of sale because the costs were inserted in the decree before taxation is without merit.—*Janes v. Bullard*, 107 Cal. 130, 40 Pac. 108.

A commissioner in partition whose fee is made a charge upon the land, is a "party in whose favor a judgment is given," within the meaning of the word "party" as used in this section.—*Cortez v. Superior Court*, 86 Cal. 274, 24 Pac. 1011, 21 Am. St. Rep. 37; *Thomas v. San Diego College Co.* 111 Cal. 358, 43 Pac. 965.

Section 3532. Issuance, Form and Requirements:

The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and be directed to the sheriff, and it must intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money, or currency, as provided in Section 3506, the execution must also state the kind of money or currency in which the judgment is payable, and must require the sheriff substantially as follows:

1. If it be against the property of the judgment debtor, it must require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or at any time

thereafter; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or any time thereafter;

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants, or trustees; it must require the sheriff to satisfy the judgment, with interest, out of such property.

3. If it be against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law;

4. If it be issued on a judgment made payable in a specified kind of money or currency, as provided in Section 3506, it must also require the sheriff to satisfy the same in the kind of money or currency in which the judgment is made payable, and the sheriff must refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he must refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. The sheriff collecting money or currency in the manner required by this Chapter, must pay to the plaintiff or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal so to do, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected;

5. If it be for the delivery of the possession of real or personal property, it must require the sheriff to deliver the possession of the same, describing it, to the party entitled thereto, and may at the same time require the sheriff to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property, it must require the sheriff to deliver the possession of the property for which the judgment was rendered, to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found then out of the real property, as provided in the first Subdivision of this Section.

1887 R. S. Sec. 4471.

Execution in justice's court: Sec. 3665.

May be issued and served on Sunday or holiday: Sec. 3017.

Description of real property must be of sufficient certainty to enable officer to identify it: Sec. 3226.

Execution, writ for the possession of premises, several defendants, judgment against part only: Sec. 3168.

Summary provisions for the discharge of judgment debtor under arrest: Sec. 3663.

Judgment payable in specific kind of money: Sec. 3506.

ISSUANCE TO OFFICER LEVYING ATTACHMENT, VALIDITY: The officer who has seized goods under writ of

attachment is the officer to whom the execution on the judgment should issue.

IMPROPER DIRECTION: The fact that an execution on a judgment in attachment delivered to the constable who held the property by virtue of the levy made by him was directed to the sheriff of the county, does not render the execution void as such direction was an improper one and amendable.

CONSTABLE, ACTION FOR UNLAWFUL SEIZURE, EXECUTION AS EVIDENCE: In an action against such constable for the value of the goods held by him under such execution, the exclusion of the execution from evidence was reversible error.—*Pecotte v. Oliver*, 2 Idaho, 230, 10 Pac. 302.

A plaintiff who, in person, or by his attorney, causes to be issued and delivered to an officer, an execution against the property of an individual member of a firm, and the judgment is against the firm by name, and there

is no judgment against the individuals composing the firm, is guilty of a trespass or tort, and is answerable for the consequences of the unlawful act.—*Hamner v. Ballantyne*, 16 Utah, 436, 52 Pac. 770, 67 Am. St. Rep. 643.

Section 3533. When Made Returnable: The execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment roll is filed. When the execution is returned, the clerk must attach it to the judgment roll. If any real estate be levied upon, the clerk must record the execution and the return thereto at large and certify the same under his hand as true copies in a book to be called the "execution book," which book must be indexed with the names of the plaintiff's and defendants in execution alphabetically arranged, and kept open at all times during office hours for the inspection of the public without charge. It is evidence of the contents of the originals whenever they or any part thereof, may be destroyed, mutilated or lost.

1887 R. S. Sec. 4472.

Execution, lien lost. Order discharging. Certified copy recording: Sec. 3316.

SALE AFTER RETURN-DAY, VALIDITY: An execution having been duly issued, placed in the hands of the

sheriff, and by him levied upon property during its lifetime, the property so levied upon may be sold after the date when the said execution must have been returned had said levy not been made.—*Ollis v. Kirkpatrick*, 2 Idaho, 976, 28 Pac. 435.

Section 3534. Its Directions may Follow Judgment: When the judgment is for money, or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or part; when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith; when the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

1887 R. S. Sec. 4473.

EXECUTIONS, EJECTMENT, REENTRY: On conviction of contempt court issues process to restore party entitled to possession: Sec. 3820.

When a person is committed to jail on execution plaintiff must advance to jailor money for the board of the pris-

oner and on failure to do so the person is discharged: Sec. 3973.

AMENDMENT: The court may order the process or writ authorized by this section to be amended upon a proper showing.—*Wilson v. Gray* (Idaho), 47 Pac. 942.

Section 3535. Execution After Five Years: In all cases other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings.

1887 R. S. Sec. 4474.

Limitation, time of issuing execution in judgments for the recovery of money: Sec. 3531.

This section in allowing a judgment to be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings, applies only to a judgment requiring the party against whom it is rendered to do some specific act.—*Dorland v. Hanson*, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 44.

By amendment of the Cal. Code, 1895, this section is extended to "all cases."

Under a statute providing that in all cases a judgment may be enforced or carried into execution after the lapse of five years from the date of entry by leave of the court, it has a discretion to grant or refuse such leave, and its order refusing leave will not be interfered with by the appellate court, unless abuse of its discretion is shown.—*Wheeler v. Eldred*, 121 Cal. 28, 53 Pac. 431, 66 Am. St. Rep. 20.

Section 3536. Executions Against Property of a Party After his Death: Notwithstanding the death of a party after the judgment execution thereon may be issued, or it may be enforced as follows:

1. In the case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest:

2. In the case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon.

1887 R. S. Sec. 4475.

Section 3537. Execution, how and to whom Issued:

Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the State. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties.

1887 R. S. Sec. 4476.

Issuing execution upon justice's judgment after abstract filed with district

clerk, to any county in the state: Sec. 3662.

PROPERTY LIABLE TO SEIZURE.

Section 3538. Property Liable to Seizure, Generally:

All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, are liable to execution. Shares and interest in any corporation or company, and debts and credits, and all other property both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale.

1887 R. S. Sec. 4477, all but last line.

Rights of garnishees in proceedings against: Secs. 3564 to 3565 and 3568.

Partners, association sued under a common name, judgment binds common property, same as though sued and served severally: Sec. 3172.

SHARES OF STOCK: Shares of stock in a corporation can only be subjected to debt by seizure under attachment, or execution in the manner prescribed by the statutes relating to such seizure.—*Wells v. Price* (Idaho), 56 Pac. 266.

IRRIGATION CORPORATION: Shares of stock owned by the execution defendant in an irrigation corporation are not appurtenant to the lands owned by such execution defendant, although he irrigates such lands with water from the canal owned by such corporation.—*Wells v. Price* (Idaho), 5^c Pac. 266.

Judgment is not subject to levy and sale under execution, but the judgment debtor may be garnished.—*Dore v. Dougherty*, 72 Cal. 232, 13 Pac. 621, 1 Am. St. Rep. 48.

A broker's seat in a stock exchange board is not subject to levy and sale under execution.—*Lowenberg v. Greenebaum*, 99 Cal. 162, 33 Pac. 794, 37 Am. St. Rep. 42.

A tenant has an interest subject to execution in wheat raised by him under a lease, in which he agrees that the wheat shall be the property of the lessor and the lessee shall have no right to dispose of or to encumber any portion thereof before delivery and segregation of tenant's share.—*Farnum v. Hefner*, 79 Cal. 575, 21 Pac. 955, 12 Am. St. Rep. 174.

The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the

county.—*Emeric v. Gilman*, 10 Cal. 404, 70 Am. Dec. 742.

County revenues in hands of treasurer are not subject to seizure on execution.—*Gilman v. County of Contra Costa*, 8 Cal. 52, 68 Am. Dec. 290 and note.

No execution can issue upon a judgment against a county, unless expressly authorized by the statute. It does not possess property liable to execution in the same sense that an individual possesses it. A statute giving a judgment creditor a right to execution and a statute exempting certain classes of property from execution against a county do not confer the right to levy an execution against the property of a county, if there is no statute granting such right in express terms. A judgment against a county, after a certified copy of it is filed, has the force and effect of an audited claim, which must be enforced in the same manner as other audited claims that are provided for by an application of unappropriated funds, or the levy of a tax, etc. It can not be otherwise enforced, for execution does not run against the county.—*Emery County v. Burresen*, 14 Utah, 323, 47 Pac. 91, 60 Am. St. Rep. 898.

As to judgment book as evidence where judgment roll lost.—*Simmons v. Threshour*, 118 Cal. 160, 50 Pac. 312.

Section 3539. Not Affected Until Levy Made: Until a levy, property is not affected by the execution.

1887 R. S. Sec. 4477, last line.

Levy, attachment: Sec. 3299.

Service of a copy of execution, and notice of garnishment on a third party, constitute no lien on property of the debtor in his hands capable of manual delivery.—*Johnson v. Gorman*, 6 Cal. 195, 65 Am. Dec. 501.

A judgment or execution lien attaches

only to the real instead of the apparent interest of the debtor, and a sale thereunder transfers no interest beyond that in fact held by the debtor, unless the purchaser buys in good faith and without any notice actual or constructive of some defect in the debtor's title.—*Riley v. Martinelli*, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209.

Section 3540. Property Claimed by Third Party, how Right Tried: If the property levied on be claimed by a third person as his property, the sheriff may summon from his county six persons qualified as jurors, between the parties, to try the validity of the claim. He must also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses must be sworn by the sheriff, and if their verdict be in favor of the claimant, the sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the sheriff and the witnesses must be paid by the claimant, if the verdict be against him; otherwise by the plaintiff. Each party must deposit with the sheriff, before the trial, the amount of his fees and the fees of the jury, and the sheriff must pay the same to the prevailing party.

1887 R. S. Sec. 4478.

INDEMNITY BONDS: In an action against the sheriff, if he gives notice to sureties, the judgment, against him is conclusive of his right to recover against sureties and summary judgment may be entered thereon: Sec. 3748.

Written claim of property levied upon in the hands of one who holds it under a conditional sale, notifying the sheriff that the claimant is the owner of the property, that the execution debtor holds it only for the purposes of resale, that he held it when seized for such purpose only, and not otherwise, sufficiently states the grounds of title required by this section.—*Vermont Marble Co. v. Brow*, 109 Cal. 236, 41 Pac. 1031, 50 Am. St. Rep. 37.

This section, Cal. Code, amended in 1891.

OFFICER'S LIABILITY: An officer, who, under an execution against a certain named person, sells property found in his possession and held under an attachment against him, but belonging to a third person, and who, upon discovering such fact after the sale, returns the money to the purchaser and the property to its real owner, and makes his return upon the execution in accordance with the facts, it not liable to the judgment creditor for the amount thus realized at the sale. A sheriff is not, by levy and sale, estopped from denying the plaintiff's right to the proceeds of the sale, nor from showing that the property sold was not defend-

ant's nor liable to such levy and sale.—*McCarthy v. O'Marr*, 19 Mont. 215, 47 Pac. 953, 61 Am. St. Rep. 502.

To justify taking property from defendant on attachment or execution, it is sufficient for the officer to produce his writ. To justify taking property under attachment or execution from a stranger to the writ, upon the ground that he obtained it from the defendant by a transfer which is fraudulent and void, because not accompanied by a change of possession, or otherwise fraudulent as against creditors, it is necessary either to show a valid judgment against such defendant if the levy is under an execution, or the existence of a debt if the levy is under an attachment.—*Sexey v. Adkinson*, 34 Cal. 346, 91 Am. Dec. 698.

BOND NOT SIGNED BY PRINCIPAL: A bond of indemnity purporting to be the bond of the plaintiff in the action, as principal, and two other persons as sureties, though not signed by such principal, is binding upon the sureties. Though the sureties sign on the condition and understanding that the principal would also sign, and never intended or consented that the bond should be delivered without his signature, they lost no substantial rights by his failure to sign with them, and if they did not make known to the officer accepting the bond the condition or understanding upon which they signed it he can not be prejudiced thereby.—*Woodman v. Calkins*, 13 Mont. 363, 34 Pac. 187, 40 Am. St. Rep. 449.

Section 3541. Property of Married Women, Exempt: All real and personal estate belonging to any married woman at the time of her marriage, or to which she subsequently becomes entitled in her own right, and all the rents, issues and profits thereof, and all compensation due or owing for her personal services, is exempt from execution against her husband.

1887 R. S. Sec. 4479.

Sheriff may be enjoined from selling under execution against the husband real property belonging to the wife.—*Alverson v. Jones*, 10 Cal. 9, 70 Am. Dec. 689; *Thorn v. Anderson* (Idaho), 63 Pac. 592.

Neither the separate property of a husband nor community property can be sold upon an execution on a judgment, obtained individually against the wife.—*Svetinich v. Sheean*, 124 Cal. 216, 56 Pac. 1028, 71 Am. St. Rep. 50.

EXEMPTIONS.

Section 3542. Property Exempted: In addition to the homestead exempted by the Civil Code, the following property belonging to an actual resident of the State, is exempt from execution, except as herein otherwise specially provided.

FIRST. Chairs, tables, desks and books to the value of two hundred dollars, belonging to the judgment debtor.

SECOND. Necessary household, table and kitchen furniture belonging to judgment debtor, including one sewing machine in actual

use in a family or belonging to a woman, stoves, stove pipe and stove furniture, beds, bedding and bedsteads, not exceeding in value three hundred dollars; wearing apparel, hanging pictures, oil paintings, and drawings, drawn or painted by any member of the family and family portraits and their necessary frames, provisions actually provided for individual or family use sufficient for six months, two cows with their sucking calves and two hogs with their sucking pigs.

THIRD. The farming utensils or implements of husbandry of a farmer not exceeding in value the sum of three hundred dollars; also four (4) oxen or four (4) horses, or four (4) mules to be selected by claimants, and their harness, one cart or wagon, and food for such oxen, horses or mules for six months; also a water right not to exceed one hundred and sixty inches of water, used for the irrigation of lands actually cultivated by him; also the crop or crops growing or grown on fifty acres of land, leased, owned or possessed by the person cultivating the same.

FOURTH. Tools or implements of a mechanic or artisan necessary to carry on his trade, not exceeding in value the sum of five hundred dollars; the notarial seal and records of a notary public; the instruments and chest of a surgeon, physician, surveyor and dentist, necessary to the exercise of their profession, with their scientific and professional libraries; the law professional libraries and office furniture of attorneys, counselors and judges and the libraries of ministers of the gospel.

FIFTH. The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also his sluices, pipes, hose, windlass, derrick, cars, pumps and tools not exceeding in value two hundred dollars; also one saddle animal and one pack animal together with their saddles and equipments belonging to a miner actually engaged in prospecting, not exceeding in value two hundred and fifty dollars.

SIXTH. Two oxen, two horses, or two mules and their harness; and one cart, wagon, dray or truck by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer habitually earns a living; and one horse with vehicle and harness or other equipment used by physician, surgeon or minister of the gospel in making his professional visits with food for such oxen, horses or mules for six months.

SEVENTH. The earnings of a judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of the execution, or levy of attachment, when it appears by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family residing in this State supported wholly or in part by his labor.

EIGHTH. The shares held by a member of a homestead association, or building or loan association duly incorporated, under the laws of the State of Idaho not exceeding in value one thousand dollars—if the person holding the shares is not the owner of a homestead under the laws of this State.

NINTH. All moneys, benefits, privileges or immunities, accruing

or in any manner growing out of any life insurance on the life of the debtor, to an amount represented by an annual premium not exceeding two hundred and fifty dollars.

TENTH. All fire engines, hooks and ladders with the carts, trucks and carriages, hose, buckets, implements and apparatus thereto appertaining and all furniture and uniforms of any fire company or department organized under any law of this State.

ELEVENTH. All arms, uniforms and accoutrements required by law to be kept by any person, also one gun.

TWELFTH. All court houses, jails, public offices and buildings, school house lots, grounds and personal property appertaining thereto, the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the court house, jail and public offices belonging to any county of this State, or for the use of schools, and all cemeteries, public squares, parks and places, public buildings, town halls, market buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this State. No article or species of property mentioned in this Section is exempt from execution issued upon a judgment recovered for its price or upon a mortgage thereon.

1887 R. S. Sec. 4480, amended 1899, 5th Ses. p. 251; 1895, 3d Ses. p. 85.

For detailed index of this section see Title "Exemption" index, Code of Civil Procedure.

Exemption, materials furnished for buildings, except for purchase price upon lien: Sec. 3346.

EXEMPTION LAWS, CONSTRUCTION: Exemption laws are to be liberally construed for the protection of the unfortunate.—*Coughanour v. Hoffman's Estate*, 2 Idaho, 267, 13 Pac. 231.

HOMESTEAD, EXEMPTION FROM EXECUTION: A judgment lien acquired before the filing of a declaration of homestead by respondent and wife, subjects such property to sale under execution. Such lien can not be divested by any subsequent acts of the owners.—*Smith v. Richards*, 2 Idaho, 464, 21 Pac. 419.

EXEMPTIONS, EARNINGS, TEMPORARY POSSESSION BY ANOTHER: When the statute makes the wages or earnings of a debtor exempt from levy of execution or attachment, such exemption continues while such wages or earnings are under control of the debtor, although temporarily in the hands of another.—*Elliott v. Hall*, 2 Idaho, 1142, 31 Pac. 796.

EXEMPTION OF TEAMSTERS. Where a plaintiff, who had been working upon a railroad, leaves such employment, and purchases a pair of

horses for the purpose of engaging in the business of a teamster or drayman, and when the evidence shows conclusively the bona fides of such intention, such horses are exempt from levy, although the plaintiff has not actually entered upon such business.—*Cleveland v. Andrews* (Idaho), 46 Pac. 1025.

JUDICIAL DETERMINATION: The question as to whether property is exempt from execution involves the exercise of judicial discretion, and its decision is not confided to the action of the attaching officer.—*Roth v. Duvall*, 1 Idaho, 149.

Laws exempting property from sale under execution should be liberally construed.—*Ferguson v. Speith*, 13 Mont. 487, 34 Pac. 1020, 40 Am. St. Rep. 459; *In re McManus*, 87 Cal. 292, 25 Pac. 413, 22 Am. St. Rep. 250 and note. Same rule applied as to statute granting right of homestead.—*Keyes v. Cyrus*, 100 Cal. 322, 34 Pac. 722, 38 Am. St. Rep. 296.

Only those articles specified in the statute can be held as exempt from execution. The word "habitual" as used in a statute exempting the horse and wagon by which a debtor habitually earns his living, does not mean exclusively; and the fact that he may have, to a limited extent, applied his team to other uses, or that some part of his living may come from some other ave-

nue of industry, can not deprive him of his exemption rights.—*Stanton v. French*, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174.

Statute exempting property of counties from execution sale is mere affirmation of common law, and can not impair the obligation of any contract. County revenues in hands of treasurer are not subject to seizure on execution.—*Gilman v. County of Contra Costa*, 8 Cal. 52, 68 Am. Dec. 290 and extended note.

Homesteads, who is the head of a family.—Note 70 Am. St. Rep. 107-115.

A homestead right upon community property does not cease upon the death of either spouse, no matter which one may have filed the declaration of homestead.—*Roberts v. Greer*, 22 Nev. 318, 40 Pac. 6, 58 Am. St. Rep. 755; *Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26.

A homestead selected by the court, and set apart to the surviving wife in proceedings to administer upon her husband's estate, is exempt from execution under any judgment for a debt existing against her in his life time, though the statute does not in express terms declare such exemption, if there is a general provision in the Codes respecting homesteads and their selection to the effect that a homestead is exempt from execution or forced sale.—*Keyes v. Cyrus*, 100 Cal. 322, 34 Pac. 722, 38 Am. St. Rep. 296.

A building constructed for use as a hotel, and primarily used for that purpose, can not be selected and held exempt as a homestead, though the debtor and his family occupied it as their home, if his and their residence therein has been for the purpose of maintaining and conducting the business of a hotel, and for no other purpose.—*McDowell v. His Creditors*, 103 Cal. 264, 35 Pac. 1031, 42 Am. St. Rep. 114.

A partner is entitled as against creditors of the firm to claim and hold a homestead in the partnership real estate.—*Ferguson v. Speith*, 13 Mont. 487, 34 Pac. 1020, 40 Am. St. Rep. 459; but see *Bishop v. Hubbard*, 23 Cal. 514, 83 Am. Dec. 132.

Homestead claim may include several contiguous lots, provided they do not exceed in value the sum of five thousand dollars, the amount allowed by the homestead law, but if the declaration of homestead claims and describes two lots of land, and the one on which the dwelling house is situated is worth five thousand dollars or more, and both are sold on an execution the purchaser will acquire a valid title to the lot on which the dwelling house is not situated.—*McDonald v. Badger*, 23 Cal. 393, 83 Am. Dec. 123.

A homestead may be claimed in public lands belonging to the United States. A mortgage of a homestead not signed by the wife is void, whether it is made on a chattel or real property. An abandoned wife may claim a homestead exemption. All outbuildings, fences, and other improvements constitute part of the homestead and can not be sold under legal process, unless, taken altogether, they exceed in value the amount exempted to the homesteader.—*Watterson v. E. L. Bonner Co.* 19 Mont. 554, 48 Pac. 1108, 61 Am. St. Rep. 527.

One who holds only a life estate in premises can not have the appraisement limited to the value of such life estate; and if it appears that the land can be divided without material injury, the life tenant can not demand that it be sold as an entirety, and that five thousand dollars of the proceeds be paid to him.—*Brown v. Starr*, 79 Cal. 608, 21 Pac. 973, 12 Am. St. Rep. 180.

Where a partnership, in embarrassed circumstances converts its means, upon the strength of which it has obtained credit, into real estate to be claimed as a homestead by one of the firm and for the purpose of placing their property beyond the reach of their creditors, the land is still liable for the debts of the firm, and is subject to the executions of the creditors, notwithstanding the declaration of homestead.—*Bishop v. Hubbard*, 23 Cal. 514, 83 Am. Dec. 132.

Though a homestead is in value largely in excess of the amount allowed by law, the levy of an execution upon it does not create a lien. Its operation is confined to serving as a foundation for proceedings under the statute for the ascertainment of the value of the property covered by the declaration of homestead, and the procurement of an order of court for the partition and sale thereof, and the application of the excess to the satisfaction of the judgment.—*Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26. If a sale be made no damage can result from such sale. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at such sale could acquire no right to the property, nor could the plaintiff suffer any injury.—*Kendall v. Clark, Sheriff*, 10 Cal. 17, 70 Am. Dec. 690. The character and exemptions which attach to a homestead in public lands do not revive on a subsequent purchase by the original holder by whom it has been sold. After such repurchase it is liable for his debts contracted before he made the original sale.—*De Lany v. Knapp*, 111 Cal. 165, 43 Pac. 598, 52 Am. St. Rep. 160.

HOUSEHOLD FURNITURE: Statute should not be narrowly construed

so as to limit the exemption to the amount required for immediate and constant use. Absence of debtor occasioned by sickness at the time of execution sale is sufficient excuse for not claiming exemption. Agreement of debtor to place property seized in hands of third party to be sold for benefit of creditors is not a waiver of exemption.—*Haswell v. Parsons*, 15 Cal. 266, 76 Am. Dec. 480.

A statute exempting the farming utensils and implements of husbandry of the judgment debtor, entitles him to retain as exempt a threshing outfit necessary to enable him to carry on his farming operations, though he also uses it in threshing for others.—*Spence v. Smith*, 121 Cal. 536, 53 Pac. 653, 66 Am. St. Rep. 62. Same is to "combined harvester."—*Estate of Klemp*, 119 Cal. 41, 50 Pac. 1062, 63 Am. St. Rep. 69.

The cost of replacing exempt implements with new implements is no measure of the value of the implements used.—*Estate of Slade*, 122 Cal. 434, 55 Pac. 158.

Term "wagon" in exemption statute, means a common vehicle for the transportation of goods. Held, a hackney coach is not.—*Quigley v. Gorham*, 5 Cal. 418, 63 Am. Dec. 139.

Exemption from execution of oxen, horses, or mules belonging to a farmer is intended to apply to such animals only as are suitable and intended for ordinary work conducted on a farm. A stallion is not exempt from execution when kept for service of mares only, and not used as a work horse.—*Roberts v. Adams*, 38 Cal. 383, 99 Am. Dec. 413.

"Teamster" is one who is engaged with his own team or teams, although perhaps he does not drive in person, in the business of hauling freight for others for a consideration, by which he habitually supports himself and family, if he has one. "Teamster" or "other laborer" defined.—*Brusie v. Griffith*, 34 Cal. 302, 91 Am. Dec. 695.

A lathe and the appliances used in running it are exempt from execution under a statute purporting to exempt the tools and implements of a mechanic necessary to carry on his trade.—*In re Robb*, 99 Cal. 202, 33 Pac. 890, 37 Am. St. Rep. 48.

A mining claim is property liable to execution.—*McKeon v. Bisbee*, 9 Cal. 137, 70 Am. Dec. 642.

When the statute makes the wages or earnings of a debtor exempt from levy of execution or attachment, such exemption continues while such wages or earnings are under the control of the debtor, although temporarily in the hands of another.—*Elliott v. Hall* (Idaho), 18 L. R. A. 586; see also note 18 L. R. A. 305-310.

If a statute exempts from execution all moneys arising out of any life insurance on the life of the debtor, if the annual premium does not exceed five hundred dollars, and a policy is obtained, the annual premium on which is a greater sum, no part of the proceeds of such policy is exempt.—*Estate of Brown*, 123 Cal. 399, 55 Pac. 1055, 69 Am. St. Rep. 74 and note. But if the annual premium is less than five hundred dollars, it may be set aside to the widow although policy is made payable to the administrator.—*Estate of Miller*, 121 Cal. 353, 53 Pac. 906.

Partnership property is not exempt from execution, and therefore subject to be set apart for the use of the partners in insolvency proceedings, although it is such property as would be exempt if one partner were the sole owner.—*Cowan v. Creditors*, 77 Cal. 403, 19 Pac. 755, 11 Am. St. Rep. 294 and note.

A ferry boat used for the transportation of passengers, teams, etc., across a stream is not exempt from execution because the ferry is on the mail route, and the boat is used also to convey the United States mail across the stream.—*Lathrop v. Middleton*, 23 Cal. 257, 83 Am. Dec. 112.

An execution creditor, who purchases land, bona fide and for value, at an execution sale against a homestead claimant, is protected against latent equities of which he has no notice, although he is in position to defeat the transfer made by the homestead claimant.—*De Lany v. Knapp*, 111 Cal. 165, 43 Pac. 598, 52 Am. St. Rep. 160. A judgment creditor who has exhausted his legal remedy by an execution returned nulla bona may, alone or with other judgment creditors, file a bill against persons holding property of the debtor which can not be reached by execution.—*Tatum v. Rosenthal*, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97; *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519.

LEVY AND SALE.

Section 3543. Writ, how Executed: The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property if there be sufficient; collecting or selling the things in action, and selling the other property

and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs.

1887 R. S. Sec. 4481.

Execution, levy on property, manner of: Sec. 3299.

Proceedings upon preferred claims of employees of judgment debtor: Sec. 3370 et seq.

Execution, provision for pro rating among judgment creditors: Sec. 3296.

Execution, sale of attached property on: Sec. 3307.

Execution, effect of appeal on levy under: Sec. 3580.

Penalty for refusal to turn over money to plaintiff on execution: Political Code, Sec. 1650.

Debts, payment of to sheriff: Secs. 3301 and 3564.

APPLICATION FOR RELEASE: An application for the release of property held under an attachment or execution returned into court should be made to the court or judge and not to the attaching officer.—*Roth v. Duvall*, 1 Idaho, 149.

PRESUMPTION OF REGULARITY. Every intendment of law is in favor of the regularity of the proceedings of a sheriff under an attachment or execution, and nothing but willful disregard of the rights of others will subject him to liability.—*Roth v. Duvall*, 1 Idaho, 149.

MAY REQUIRE INDEMNITY: When the sheriff has doubts as to the legality of a levy in the first instance, he may refuse to execute the writ, unless indemnified; but if he does attach, and returns his writ he places all question as to its validity before the court.—*Roth v. Duvall*, 1 Idaho, 149.

SHERIFFS, ACTION ON BOND, LIABILITY OF SURETY: Where a sheriff receives payment for the amount called for by an execution issued upon judgment and neglects to pay over the same, the sureties of the sheriff are responsible therefor in an action upon the bond.

SAME: Penalty provided for under Sections 1874-1876, Rev. St. Idaho, is not recoverable from the sureties upon the official bond of the sheriff.—*Robinson v. Kinney*, 2 Idaho, 1170, 31 Pac. 815.

JUSTIFICATION UNDER WRIT: To justify a sale under an execution, as against a stranger to the writ, an

officer seeking to justify thereunder must prove a valid judgment.

Although an officer can not fully justify a seizure under a writ of attachment or execution valid on its face, as against a stranger to such writ, without proving the jurisdictional facts upon which the writ is issued, under Section 3021, Rev. St. by showing absence of an actual and continued change of possession, yet he may, in such case, to protect himself against exemplary damages, show that the chattels seized by him under such writ were recently in possession of the defendant named in the writ, and in connection therewith he may also show a lack of change of possession; but such showing will only protect him from exemplary damages when he fails to prove the jurisdictional facts necessary to issuance of a valid writ. He is permitted to make this showing to prove his good faith in making the seizure.—*Sears v. Lydon* (Idaho), 49 Pac. 122.

If property is held under an attachment to satisfy a judgment, no levy of execution beyond giving notice of sale is necessary.—*McFall v. Buckeye Grangers' W. Ass'n*, 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47.

LEVY: Seizure of a bag of coin held in hand, upheld.—*Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492.

Execution is sufficient justification to sheriff for seizure of property of debtor, whether it be in his actual possession or in the possession of an agent or parties holding it for his benefit. Where stranger to execution is in possession of property, claiming it as his own by virtue of a transfer to him from the debtor, which would prevent the latter himself from retaking the possession, the officer must produce, not only the writ, but the judgment which authorizes its issuance.—*Bickerstaff v. Douth*, 19 Cal. 109, 79 Am. Dec. 204.

SALE UNDER EXECUTION IN VIOLATION OF INJUNCTION: The issuing of an execution and sale of real property during the existence of a preliminary injunction restraining the same, renders the same voidable, and the execution and sale may, upon proper proceedings taken, be set aside.

Such sale is not, however, void, and a deed made under it confers a valid title.—*Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256.

Where a sheriff has levied on and is about to sell property of an execution debtor, and the defendant in execution obtains from the court in which the judgment was rendered an injunction restraining the plaintiff in the judgment, his servants, etc., from proceeding to sell under such execution, and this injunction is served upon the sher-

iff, who, in defiance of it, afterwards makes the sale, he is a naked trespasser, and liable to damages—even though he be not a party to the injunction suit.—*Buffandeau v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 139.

Keeper's fees and expenses are not "accruing costs" within the meaning of this section and are not chargeable against the defendant unless included in the judgment.—*Hotchkiss v. Smith*, 108 Cal. 287, 41 Pac. 304.

Section 3544. Notice of Sale, how Given: Before the sale of the property on execution, notice thereof must be given, as follows:

1. In case of perishable property, by posting written notice of the time and place of sale in three (3) public places of the precinct or city where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property.

2. In case of other personal property, by posting a similar notice in three public places in the precinct or city where the sale is to take place for not less than five nor more than ten days before the time set for the sale, and by publishing a copy thereof at least one week, and not more than two weeks, in a newspaper published in the county, if there be one.

3. In case of real property, by posting a similar notice, particularly describing the property, for twenty days, in three public places in the precinct or city where the property is situated, and also where the property is to be sold, and by publishing a copy thereof once a week for the same period before the time set for the sale, in a newspaper published in the county, if there be one. When judgment, under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment.

1901, 6th Ses. p. 156.

Currency, etc.: Sec. 3532, Sub. 4.

NOTICE OF SALE, POSTPONE-MENT: Notice of sale of real estate levied upon under execution may, under our statute, be given by posting written or printed notices or by publication in a newspaper published in the county, and the sale may be postponed by announcing the fact at the time advertised, and giving notice by writing same on original notice, or putting notice thereof under original.—*Ollis v. Kirkpatrick*, 2 Idaho, 976, 28 Pac. 435.

Statutory provisions as to levy and notice of sale on execution are directory generally, and not mandatory. Execution sale is not vitiated by non-compliance with statute as to levy and notice, and can not be set aside on that ground, but the remedy is against the officer.—*Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475 and note. And the purchaser's title to real estate sold under execution is not affected by irregularities in making the levy, sale, and return.—*Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441.

Section 3545. Selling Without Notice, Penalty, Defacing Notice: An officer selling without the notice prescribed by the last Section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages; and a person wilfully taking down or defacing the notice posted, if done before the sale or the

satisfaction of the judgment (if the judgment be satisfied before sale), forfeits five hundred dollars.

1887 R. S. Sec. 4483.

Section 3546. Conduct of Sale, Officer Cannot Purchase:

All sales of property under execution must be made at auction, to the highest bidder, between the hours of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser, or be interested in any purchase, at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately, or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions.

1887 R. S. Sec. 4484.

SALE OF SEVERAL PARCELS.

When real property consists of several lots or parcels, they must be sold separately, or offered for sale in parcels; and if no bids are received and the lots or parcels are adjacent, they may be sold in a lump.—*Ollis v. Kirkpatrick*, 2 Idaho, 976, 28 Pac. 435.

JUDGMENT DEBTORS MAY DIRECT: Section 4484, Rev. St. provides that the judgment debtor may direct the order in which different parcels of property levied on shall be sold under execution. J., the judgment debtor, at a sale under execution, directed that

one of the parcels of land levied on should be first sold, but the sheriff disobeyed said direction. The defendant moved to set aside the sale. Held, that the sheriff had no authority to sell except in the order that the judgment debtor directed, and that the sale was properly set aside.—*Woody v. Jameson* (Idaho), 50 Pac. 1008.

A sheriff who sells personal property under execution, which is immediately taken possession of by the purchaser, is only liable, upon such sale being set aside, for his failure to retake the property.—*Orton v. Brown*, 113 Cal. 561, 45 Pac. 835.

Section 3547. Proceedings on Refusal to Pay Purchase Money:

If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction.

1887 R. S. Sec. 4485.

Misrepresentations of the judgment creditor that his judgment was a first

lien, prevents a recovery of the purchase price by the sheriff.—*Webster v. Haworth*, 8 Cal. 21, 68 Am. Dec. 287.

Section 3548. When Sheriff may Refuse Bid: When a purchaser refuses to pay, the officer may, in his discretion, thereafter, reject any subsequent bid of such person.

1887 R. S. Sec. 4486.

Section 3549. Officer's Liability Limited: The two preceding Sections must not be constructed to make the officer liable

for any more than the amount bid by the second or subsequent purchaser and the amount collected from the purchaser refusing to pay.

1887 R. S. Sec. 4487.

Section 3550. Personal Property, Delivered to Purchaser: When the purchaser of any personal property capable of manual delivery, pays the purchase money, the officer making the sale must deliver to the purchaser the property, and if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

1887 R. S. Sec. 4488.

An execution purchaser of personal property acquires no better title than debtor has. The fact of vendee's fraudulent title is provable against an execution purchaser.—*Sargent v. Strum*, 23 Cal. 359, 83 Am. Dec. 118.

Upon the sale of personal property under execution to a stranger to the writ it is not necessary that there be a change of possession. The property may be left in the possession of the former owner on any contract of bailment that the law allows in any other case.—

Matteucci v. Whelan, 123 Cal. 312, 55 Pac. 990, 69 Am. St. Rep. 60.

An execution sale is void unless supported by a valid judgment. If the judgment is vacated or satisfied after issuance and before sale the result is the same, and the purchaser is charged with notice of proceedings subsequent to issuance, such as an appeal, and ignorance of the fact of the vacation of the judgment by reason of such proceedings is no defense in an action by the defendant to recover the property.—*Bullard v. McArdle*, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176.

Section 3551. Property not Capable of Manual Delivery, how Sold: When the purchaser of any personal property not capable of manual delivery pays the purchase money, the officer making the sale, must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

1887 R. S. Sec. 4489.

REDEMPTIONS.

Section 3552. Real Property, what Certificate must Contain; Absolute Sale, when: Upon a sale of real property, the purchaser is substituted to, and acquires all the right, title, interest and claim of the judgment debtor thereto; and all his right, title, interest, and claim thereto at any time during any subsisting lien thereon by attachment in the action, or by the docketing of the judgment. When the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases the property is subject to redemption, as provided in this Chapter. The officer must give to the purchaser a certificate of sale containing:

1. A particular description of the real property sold;
2. The price bid for each distinct lot or parcel;
3. The whole price paid;
4. When subject to redemption, it must be so stated. And when the judgment, under which the sale has been made is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency in which such redemption may be made, which must be the same as that specified in the judgment.

A duplicate of such certificate must be filed for record by the officer in the office of the recorder of the county.

1887 R. S. Sec. 4490.

Certificate: Sec. 3551.

Sheriff's deed, passes what title: Sec. 3555.

Injunction to restrain person in possession from committing waste: Sec. 3585.

Recovery of damages for waste: Sec. 3586.

Writ of assistance: Secs. 3532 and 3820.

PURCHASER AT SHERIFF'S SALE: A purchaser under execution does not depend for his title upon the return of the sheriff.—Hazard v. Cole, 1 Idaho, 276.

EFFECT OF FILING CERTIFICATE OF SALE: The filing of a certificate of sale of real estate by the officer making the sale, and in the manner prescribed by statute, imparts to all the world constructive notice of the estate acquired by the purchaser under it, as well as the fact of sale and its legal consequences.—Hazard v. Cole, 1 Idaho, 276.

MUST SHOW VALID JUDGMENT: To entitle a purchaser under a judicial sale to a writ of assistance, such purchaser must show a valid judgment.—Vermont Loan & Trust Co. v. McGregor (Idaho), 51 Pac. 104.

Section 3553. Real Property, by whom it may be Redeemed: Property sold subject to redemption, as provided in the last Section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

2. A creditor having a lien by judgment or mortgage on the property sold, on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this Section are, in this Chapter, termed redemptioners.

1887 R. S. Sec. 4491.

The lien of a judgment docketed against the judgment debtor in his life time is not released or affected by his death pending the time limited by the statute for the continuance of such lien.—Morton v. Adams, 124 Cal. 229, 56 Pac. 1038.

The grantee of a judgment debtor whose land has been sold under execution pursuant to foreclosure is a "suc-

VOIDABLE JUDGMENT: A purchaser at a sheriff's sale under execution upon a judgment which is voidable only acquires a good title.—Hazard v. Cole, 1 Idaho, 276.

SETTING ASIDE SALE BEFORE DEED: The proper remedy to set aside a judicial sale which has been wrongfully made, prior to the making of the sheriff's deed, is by motion in the principal action, notice of which must be served upon the adverse party, and upon the purchaser.—Woody v. Jamieson (Idaho), 50 Pac. 1008.

Purchaser at execution sale rests for title, upon judgment, execution, levy sale and deed; and he need show no more to entitle him to whatever rights the defendant in execution had in the property sold. It does not depend upon the sheriff's return to the writ.—Cloud v. El Dorado County, 12 Cal. 128, 73 Am. Dec. 526. See also 11 Cal. 238, 70 Am. Dec. 775.

Where a conveyance is invalid as to the grantor by reason of the fraud of an attorney in fact who has authority to convey, it is not absolutely void, and a bona fide purchaser from the grantee, for value, without notice of the fraud, will hold the title as against the grantor and his heirs.—Duff v. Randall, 116 Cal. 226, 48 Pac. 66.

cessor in interest" of the judgment debtor, and not a "redemptioner" within the meaning of Secs. 701 and 705, Cal. Code of Civil Procedure (Idaho Code, Secs. 3553 and 3557), and he is entitled to redeem in the same manner as the judgment debtor.—Phillips v. Hagart, 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 369. As to right of successor in interest to redeem, see also.—Southern Cal. L. Co. v. McDowell, 105 Cal. 99, 38 Pac. 627.

Section 3554. When it may be Redeemed, Redemption Money: The judgment debtor or redemptioner may redeem

the property from the purchaser within one year after the sale, on paying the purchaser the amount of his purchase with ten per cent. thereon in addition, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, and interest on such amount; and, if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made the amount of such lien with interest.

1887 R. S. Sec. 4492; amended 1899, 5th Ses. p. 241; 1895, 3d Ses. p. 34.

Time may be extended by action to compel accounting by purchaser for rents and profits: Sec. 3559.

FORECLOSURE, CONSTRUCTION OF STATUTE: The amendments to Section 4492 Rev. St. made by the act of March 5th, 1895 (Laws 1895, page 34), and re-enacted in 1899, in its present form, extended the time of redemption from judicial sales, and it was decided by the court that such amendment did not affect sales under foreclosure of mortgages when the mortgage was executed and recorded prior to the time the amendment became a law.—*Wilder v. Campbell, Sheriff (Idaho)*, 43 Pac. 677.

SHERIFF'S FEES: Where a sheriff has sold property under execution and received his percentage allowed by law for collecting and paying over money, he can not again collect such percentage on a redemption of the property.—*Coeur d'Alene Hardware Co. v. Cameron (Idaho)*, 42 Pac. 509.

REDEMPTION: After a sale has been made under execution, the rights of the purchaser and the judgment debtor are fixed as by contract, and the legislature cannot subsequently authorize a redemption after a longer time, or for a less sum, than was required by the law in force when the sale was made.—*Thresher v. Atchison*, 117 Cal. 73, 48 Pac. 1020, 59 Am. St. Rep. 159.

To redeem property which has been sold under a mortgage, it is not sufficient to tender the amount of the sale where it is less than the mortgage debt. The whole mortgage debt must be tendered or paid into court.—*Collins v. Riggs*, 14 Wall. 491.

Redemptioner, to redeem, must pay full amount of judgment in favor of a mortgagee who purchases at the foreclosure sale for less than the face of the judgment. The amount bid and interest is insufficient. Mortgagee becoming purchaser for less than judgment has lien upon the property prior to that of

the redemptioner for the balance unpaid.—*McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 665.

Mortgagee cannot require, as a condition of redemption, the payment of any other debt not a lien upon the land. The payment of debt not secured by mortgage cannot be exacted as a condition of redemption therefrom. The maxim that a complainant seeking equity should be compelled to do equity applies only when the relief sought by him and the right demanded by the defendant belong to or grow out of the same transaction.—*Mahoney v. Bostwick*, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175.

Purchaser at an execution sale has, before the time for redemption expires, an interest in the property in the nature of a lien thereon, and is therefore entitled to the rights and remedies of a lienholder. Purchaser at an execution sale, though the time in which redemption can be made has not expired, is entitled to be subrogated to a trust deed existing at the time of the sale upon paying to the holder thereof the amount due from the defendant in the execution.—*Swain v. Stockton Savings, Etc. Society*, 78 Cal. 600, 21 Pac. 365, 12 Am. St. Rep. 118.

A prior redemptioner who has effected a valid redemption has succeeded to the rights of the purchaser, as owner of an equitable estate in lands, which, though conditional, may become absolute by mere lapse of time, to which rights are added the rights of a redemptioner; and he has such an estate in the land as entitles him to protection against an assumed junior redemptioner under a void judgment.—*Bennett v. Wilson*, 122 Cal. 509, 55 Pac. 290, 68 Am. St. Rep. 61.

A certificate of redemption from an execution sale is no part of the redemption, and the refusal of the sheriff to issue such certificate to the person redeeming is immaterial.—*Phillips v. Hagart*, 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 369.

Section 3555. Redemption Right. Notice. Sheriff's Deed: If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption and

within one year after the sale, again redeem it from the last redemptioner on paying the sum paid on such last redemption with four per cent. thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon, after the redemption by him with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien.

The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption and within one year after the sale, on paying the sum paid on the last previous redemption with four per cent. thereon in addition and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest.

Written notice of redemption must be given to the sheriff, and a duplicate filed for record with the recorder of the county; and, if any taxes or assessments are paid by the redemptioner, or, if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the recorder, and if such notice be not filed, the property may be redeemed without paying such tax, assessment or lien.

If no redemption be made within one year after the sale, the purchaser, or his assignee, is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed and no other redemption has been made, and notice thereon given, the time for redemption by a redemptioner has expired, and the last redemptioner or his assignee, is entitled to a sheriff's deed at the expiration of one year after the sale; but in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property.

If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner.

If a debtor redeem, the effect of the sale is terminated and he is restored to his estate.

Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged and proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale.

1887 R. S. Sec. 4493; amended 1899, 5th Ses. p. 241; 1895, 3d Ses. p. 34.

Execution of sheriff's deed after expiration of office of sheriff making sale: See Sec. 1669, Political Code.

Writ of assistance: Sec. 3532.

SHERIFF'S DEED, TITLE UNDER:
In order to uphold and give validity to a sheriff's deed, it must appear that a

valid judgment was obtained against a party, whose property is sought to be conveyed by it, and that the property was sold upon an execution issued upon such judgment. These prerequisite proofs must be produced before a prima facie title can be established under the deed.—*Leland v. Isenbeck*, 1 Idaho, 469.

ACTION AGAINST SHERIFF RE-

FUSING DEED: A sheriff who has sold property under execution sale, and refused to make deed therefor to the purchaser, the execution defendant whose title was sold, and a third party who claims adversely to the plaintiff, may be joined as defendants in an action by the purchaser to obtain a sheriff's deed to the property purchased by him at such execution sale.—*Brady v. Linnehan* (Idaho), 51 Pac. 761.

Redemption, etc.: See note Sec. 3454.

EXECUTION SALE: The sale of a purchaser's interest in land acquired by him under execution sale, before the expiration of the time for redemption, operates as assignment of the sheriff's certificate of sale, and the subsequent execution of the sheriff's deed to the execution purchaser's grantee vests in him a perfect title.—*Leonard v. Flynn*, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500.

Quit claim deed executed by purchaser of land at sheriff's sale after time for redemption has expired, and before the sheriff's deed is given, is equivalent to an assignment of the sheriff's certificate of sale; and if the sheriff afterwards executes a deed to the purchaser, the same is void as between the parties.—*Ward v. Dougherty*, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151.

SETTING ASIDE SHERIFF'S SALE: A court of equity will not set aside a sheriff's sale and a deed executed under it in a collateral action commenced for that purpose, by reason of the irregularities in the conduct of the officer in making the levy and sale. If the parties have any remedy under such circumstances, it is by motion properly made in the court where the judgment was rendered, to set aside the sale.—*Boles v. Johnston*, 23 Cal. 226, 83 Am. Dec. 111.

Duty of sheriff under execution is to levy upon and sell all the right, title,

and interest of the debtor in the property; and the fact that the officer, through ignorance or mistake, failed to set forth fully and correctly the nature of such interest, will not prejudice the purchaser's title thereto.—*Dodge v. Walley*, 22 Cal. 224, 83 Am. Dec. 61.

Purchaser at sheriff's sale of real property under execution gets only such interest as the judgment debtor possessed. If the judgment debtor has nothing, the purchaser gets nothing, and the sale is a nullity.

Recitals in a sheriff's deed are conclusive as between the parties to it and those claiming under them, and cannot be contradicted by parol evidence showing that the land was sold under a different judgment and execution than those recited in the deed.—*Zabriskie v. Meade*, 2 Nev. 285, 90 Am. Dec. 542.

Officer executing deed of land sold by him under execution must recite therein the facts constituting his authority to sell and convey; as this is essential to show a transmission of the debtor's title in the property to the purchaser.—*Donahue v. McNulty*, 24 Cal. 411, 85 Am. Dec. 78 and note.

A deputy sheriff may, after the expiration of the term of office of his principal, and in the absence of the latter from the state, execute a deed to the purchaser at a judicial sale, made by the sheriff while in office. The authority of the deputy is not impaired by the statute allowing the deed in such cases to be executed by the succeeding sheriff.—*Mills v. Tukey*, 22 Cal. 373, 83 Am. Dec. 74.

Independent of statute, the court, by virtue of its original jurisdiction, has authority to appoint a suitable person to make and deliver the deed, in the enforcement of its judgment, and that its final process may be completely executed.—*People v. Boring*, 8 Cal. 406, 58 Am. Dec. 331. See Sec. 1669, Political Code.

Section 3556. To whom Payments are to be Made:

The payments mentioned in the last two Sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment.

1887 R. S. Sec. 4494.

The sheriff is not so far the agent of the purchaser or of a prior redemptioner as to bind or estop him from questioning the validity of a subse-

quent redemption upon which the money is paid to the sheriff, under this section.—*Bennett v. Wilson*, 122 Cal. 509, 55 Pac. 390.

Section 3557. What Redemptioner must do to Redeem: A redemptioner must produce to the officer or person from whom he seeks to redeem and serve with his notice to the sheriff;

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or recorder of the county where the judgment is docketed or filed; or, if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the recorder;

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself or of a subscribing witness thereto;

3. An affidavit by himself or his agent, showing the amount then actually due on the lien.

1887 R. S. Sec. 4495.

The grantee of a judgment debtor whose land has been sold under execution pursuant to foreclosure is a "successor in interest" of the judgment debtor, and not a "redemptioneer" within the meaning of Secs. 701 and 705,

Cal. Code of Civil Procedure (Idaho Code, Secs. 3553 and 3557), and he is entitled to redeem in the same manner as the judgment debtor.—*Phillips v. Hagart*, 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 369.

Section 3558. Court may Restrain Waste on Property: Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor or for the repair of fences; or for fuel in his family, while he occupies the property.

1887 R. S. Sec. 4496.

Injunction may be issued to restrain party in possession after foreclosure or execution sale from committing waste: Secs. 3385 and 3386.

Execution, redemptioner or purchaser, real estate, may recover damages for injury by tenant in possession after sale and before conveyance: Sec. 3386.

PERIOD OF REDEMPTION, POSSESSION: Under Section 4496, Rev. St. 1887, the purchaser of real estate at execution sale is not entitled to possession thereof, until the period of redemption has expired.—*Cantwell v. McPherson* (Idaho), 34 Pac. 1095.

See also *People v. Tallmadge*, 114 Cal. 422, 46 Pac. 278.

Section 3559. Rents and Profits: The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amount of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption demands in writing of such purchaser, or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns, to such redemptioner or debtor. If such purchaser or his

assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor, may, within sixty days after said demand, bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

1887 R. S. Sec. 4497.

EXECUTION SALE OF INTEREST OF ONE CO-TENANT: When he must account to purchaser for moiety of rents.—*Harris v. Foster*, 97 Cal. 292, 32 Pac. 246, 33 Am. St. Rep. 187.

The purchaser is entitled to all the rents and profits of the property sold or the value of its use and occupation from the time of the sale until the re-

demption, and if no redemption is made he is entitled to retain these rents and profits without any obligation to account therefor to the mortgagor.—*Duff v. Randall*, 116 Cal. 226, 48 Pac. 66.

As to rents, issues and profits generally: See *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Bennett v. Wilson*, 122 Cal. 509, 55 Pac. 390; *Yndart v. Den*, 125 Cal. 85, 57 Pac. 761.

GENERAL PROVISIONS.

Section 3560. Failure of Title. Rights of Purchaser.
Revival of Judgment: If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, after notice and on motion of such party in interest, or his attorney, revive the original judgment in the name of the petitioner, for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more.

1887 R. S. Sec. 4498.

For further provision concerning power of the supreme court to restore property and rights lost by erroneous judgment, for the protection of purchaser and actions against judgment creditor: Sec. 3592.

REVIVAL OF JUDGMENT, LIMITATION: A proceeding to revive an original judgment under the provision of Section 4498, Rev. St. 1887, which declares that if the purchaser of real property sold on execution fails to recover possession thereof "because the property sold was not subject to execution and sale," does not accrue until the fact is known to the purchaser.—*Cantwell v. McPherson* (Idaho), 34 Pac. 1095.

FORECLOSURE OF MORTGAGE, FAILURE OF TITLE, REVIVAL OF JUDGMENT: W., having made entry

and final proof on certain lands under the desert land laws of the United States, mortgaged same. Default having been made in payments secured by mortgage, the same was foreclosed, and at the sale the assignee of the mortgage became the purchaser. Prior to said sale, one R. had instituted proceedings in the proper land office to contest said desert entry of W., which contest eventuated in the cancellation of said entry of W. by the commissioner of the general land office. Held, that under Section 4498 of the Rev. St. of Idaho the plaintiff was entitled to file his petition to revive the judgment entered on the foreclosure of the mortgage.—*Cantwell v. McPherson*, 2 Idaho, 1044, 29 Pac. 102.

An innocent vendee of the original purchaser at an execution sale of his redemptioner will be protected against

irregularities in the sale of which he had no notice, whether he is proceeded against by action or by motion to set aside the sale.—*Hudepohl v. Liberty Hill Etc. Co.* 94 Cal. 588, 29 Pac. 1025, 28 Am. St. Rep. 149.

The common law rules as to the validity of judicial sales are not changed by this section concerning rights of purchasers who have been evicted. The section merely guards against mischievous consequences in certain cases, by affording a remedy which the common law did not.—*Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404.

If, on a sale under judgment, the plaintiff buys in the property, he must restore it to the defendant, on reversal of the judgment. It is otherwise, as to a stranger, a bona fide purchaser, without notice. He is not within the rule. But to constitute himself such purchaser, he must show that he has paid the purchase money, and also, that he is the purchaser of the legal title, not of a mere equity. And a purchaser at execution sale is not clothed with the legal title, until he receives a sheriff's deed.—*Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459.

Section 3561. Proceedings to Compel Contribution:

When upon an execution against several persons more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case, the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice, the clerk must make an entry thereof in the margin of the docket.

1887 R. S. Sec. 4499.

CHAPTER CL.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

Section.

3562. Debtor required to answer concerning his property, when.

3563. Proceedings to compel debtor's appearance, absconding, arrest of.

3564. Debtor of the judgment debtor may pay sheriff.

Section.

3565. Examination of those having property belonging to judgment debtor.

3566. Witness required to testify.

3567. Judge may order property to be applied on execution.

3568. Proceedings upon adverse claim by third parties.

3569. Disobedience of orders, how punished.

Section 3562. Debtor Required to Answer Concerning His Property, when: When an execution against property of the judgment debtor or of any of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he do not reside in this State, to the sheriff of the county where the judgment roll is filed, is returned unsatisfied in whole or in part, the judgment creditor at any time after such return is made, is entitled to an order from the judge of the court, requiring such judgment debtor to appear and answer upon oath concerning his property, be-

fore such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides.

1887 R. S. Sec. 4504.

Proceedings under this chapter made applicable to justice's court: Sec. 3663.

Execution, proceedings in aid of, when receiver appointed: Sec. 3318.

CREDITOR'S BILLS: Proceedings supplementary to execution, authorized by the statutes are a substitute for creditor's bills, and supplant proceedings in equity, unless some special ground exists upon which to invoke the power of chancery. If, under execution, a debtor of the defendant is garnished, no action can be sustained by a judgment creditor against such debtor. The only remedy is the one provided by proceedings supplemental to execution, under which, by the statute, the creditor must obtain an order for the debtor of the defendant to appear and answer, and upon such appearance, if the debt is admitted, an order may be made for its payment into court; and if the debt is denied, an order may be entered authorizing the judgment creditor to institute an action to recover the alleged debt. A creditor's bill cannot be sustained unless it is shown that the remedies at law have

been exhausted, or must be unavailing.—*Herrlich v. Kaufmann*, 99 Cal. 271, 33 Pac. 857, 37 Am. St. Rep. 50.

Where the property of money is claimed adversely by a third party, either as a purchaser or a lienholder, the court cannot order payment or delivery to plaintiff, but should authorize an action under the provisions of Sec. 3568.—*Lewis v. Chamberlain*, 108 Cal. 525, 41 Pac. 413; *Deering v. Richardson-Kimball Co.* 109 Cal. 73, 41 Pac. 801, and in such cases the plaintiff is not required to pursue the statutory remedy as the same is inadequate, but may proceed by creditor's bill.—*Rapp v. Whittier*, 113 Cal. 429, 45 Pac. 703.

The right of an inventor in his patent may be reached and sold upon proceedings supplementary to execution.—*Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120 and note. Also money of distributee in hands of administrator, after decree of distribution, may be garnished by a creditor of the distributee, or may be reached by proceedings supplementary to execution.—*Estate of Nerac*, 35 Cal. 392, 95 Am. Dec. 111.

Section 3563. Proceeding to Compel Debtor's Appearance. Absconding, Arrest of: After the issuing of an execution against property, and upon proof by affidavit of a party or otherwise, to the satisfaction of the court or of a judge thereof, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place before such judge or a referee appointed by him to answer upon oath concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment, as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final termination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking he may be committed to prison.

1887 R. S. Sec. 4505.

Express findings are not required to sustain the action of the court in pro-

ceedings in aid of execution.—*Lyons v. Marcher*, 119 Cal. 382, 51 Pac. 559.

Section 3564. Debtor of the Judgment Debtor may Pay Sheriff: After the issuing of an execution against property and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount so paid.

1887 R. S. Sec. 4506.

Section 3565. Examination of Those Having Property Belonging to Judgment Debtor: After the issuing or return of an execution against property of the judgment debtor or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has money or property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

1887 R. S. Sec. 4507.

An affidavit for an order for the examination of a garnishee, containing a statement, substantially in the language of the statute, that he "has property of said judgment debtor," is sufficient to show that the garnishee has such property. Such statement is not a mere conclusion of law. A garnishee

who appears and answers, and proceeds to a hearing, upon a citation issued on an affidavit for an order for the examination of himself, as garnishee, thereby waives any objection to the insufficiency of the affidavit.—*Coffee v. Haynes*, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99.

Section 3566. Witness Required to Testify: Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this Chapter, in the same manner as upon the trial of an issue.

1887 R. S. Sec. 4508.

Section 3567. Judge may Order Property to be Applied on Execution: The judge or referee may order any money or property of a judgment debtor not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

1887 R. S. Sec. 4509.

In proceedings supplementary to execution in justice's court, an order requiring the judgment debtor to apply

designated property to the satisfaction of a judgment is not appealable.—*Wells v. Torrance*, 119 Cal. 437, 51 Pac. 626.

Section 3568. Proceedings upon Adverse Claim by Third Parties: If it appears that a person or corporation, alleged to have money or property of the judgment debtor, or to be indebted to him, claims an interest in the money or property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation, for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modi-

lied or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

1887 R. S. Sec. 4510.

Complaint examined and, held, to state a cause of action under the provisions of this section.—*Simpson v. Remington* (Idaho), 59 Pac. 360.

Where jurisdiction is once acquired over the judgment debtor in the original action, that action is still pending until the judgment is satisfied, and proceedings to compel the application of money or property in the hands of other parties to the satisfaction of the judgment are proceedings in that action. This section is therefore not unconstitutional on the ground that the debtor has under it no notice of the supplementary proceedings after judg-

ment affecting his rights of property, nor on the ground that his debtor may be compelled to pay the debt twice.—*High v. Bank of Commerce*, 95 Cal. 386, 30 Pac. 556, 29 Am. St. Rep. 121. As to sufficiency of complaint in action against garnishee in supplemental proceedings.—*Id.*

It is not necessary before bringing action against a garnishee upon his direct liability under the provisions of Section 3301 that he be required to appear and answer or that the action be authorized by order of court.—*Carter v. Los Angeles Nat. Bk.* 116 Cal. 370, 48 Pac. 332.

Section 3569. Disobedience of Orders how Punished:

If any person, party, or witness disobey an order of the referee properly made in the proceedings before him under this Chapter, he may be punished by the court or judge ordering the reference, for a contempt.

1887 R. S. Sec. 4511.

Contempt: Secs. 3819 et seq.

CHAPTER CLI.

APPEALS IN CIVIL ACTIONS.

Section.

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GENERAL PROVISIONS.

Section 3570. Judgment and Orders may be Reviewed: A judgment or order, in a civil action, except when ex-

pressly made final, may be reviewed as prescribed in this Code, and not otherwise.

1887 R. S. Sec. 4800.

Appeals from district court to supreme court from judgments and orders: Sec. 3573.

Appeals from Justice's and probate courts to district court: Sec. 3683 et seq.

Appeals from probate court in probate matters: Sec. 4399 et seq.

Appeals from board of county commissioners to district court are contained in Political Code: Secs. 1608 to 1610. For procedure in: See note Sec. 3683.

When review may be had upon certiorari: Sec. 3758.

Limited to jurisdictional irregularities: Sec. 3764.

Appellate court may also exercise control over inferior tribunals and judicial officers before judgment:

First—By mandamus to compel the performance of a purely ministerial act: Sec. 3769.

Second—By prohibition to restrain threatened act in excess or outside of jurisdiction: Sec. 3783.

Agreed case is subject to appeal: Sec. 3961.

Disbarment proceedings appealable: Sec. 3500.

Arbitration awards, order relating to or judgment upon, when appealable: Sec. 3884.

Appeal may be taken from proceedings for voluntary dissolution of corporation: Sec. 3840.

Appeal in insolvency proceedings, when: Sec. 3951.

Probate court, provisions applicable to: Sec. 4315. Appeal within sixty days: Sec. 4316.

Judgment in cases of contempt are not appealable: Sec. 3833, but may be brought into court by writ of review when court exceeds jurisdiction: Note Sec. 3883.

VOID JUDGMENT: A judgment which is void ab initio, may be attacked collaterally without appealing therefrom to the supreme court.—Leland v. Isenbeck, 1 Idaho, 469.

ERRONEOUS JUDGMENT, REMEDY, APPEAL: An erroneous judgment cannot be set aside on motion or application made more than six months after judgment; and when, on motion to set aside a judgment, it appears that the court had jurisdiction of the subject matter of the action, and of the person of the defendant, the motion should be denied, however erroneous the judgment may be, the remedy of the aggrieved party being by appeal, and not by motion.—Bunnell & Eno Inv. Co. v. Curtis (Idaho), 51 Pac. 767.

JUDGE AT CHAMBERS: An appeal lies from the judgment of a district judge at chambers.—People ex rel. Huston v. Lindsay, 1 Idaho, 394.

RELIEF OBTAINED IN COURT BELOW: Any relief sought, which is attainable in the court below, cannot be granted in the first instance in the appellate court.—Fox v. West, 1 Idaho, 782.

WHEN EXCEPTIONS MUST BE TAKEN: If a party desires to have a decision of the district court reviewed by the supreme court, he must except thereto when the rulings or decision is made; (except as provided in Section 3516) and he must also preserve and bring up such exceptions by bill of exceptions, or statement (unless the errors are otherwise apparent in the record).—People ex rel. Huston v. Hunt, 1 Idaho, 433.

EFFECT OF APPEAL: An appeal to the supreme court carries with it only such proceedings as were had in the district court down to time of perfecting of said appeal; and any process issued in said cause after said appeal, whether with or without authority of law, is under the control of the district court.—Miller v. Pine Min. Co. (Idaho), 32 Pac. 207.

WRIT OF ERROR, WHEN ENTERTAINED: Where the statutes fail to provide for an appeal from a final judgment of the district court to the supreme court, the supreme court will entertain a writ of error, or other proper writ, to bring such judgment before it for review, under the provisions of Section 9 of Article V of the state constitution.—State v. Reid (Idaho), 32 Pac. 202.

SAME, PARTIES: A writ of error may be sued out under the statute by one or more of several defendants, without joining their co-defendants in a writ.—Alexander & Co. v. Leland, 1 Idaho, 425.

APPEAL, DEFAULT JUDGMENT: The defendant has a right to appeal from a judgment by default without moving to set aside the default or otherwise proceeding in the court below.—Howard v. Galloway, 60 Cal. 10.

An appeal may be prosecuted from an order refusing to vacate a judgment where there is no other method in which the right of the appellant to the relief sought by him can be presented to the appellate court, and the facts on account of which he bases his claim to relief do not appear from an inspection of the judgment roll.—De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165.

An appeal may be taken from a judgment rendered by a judge at chambers in a special proceeding to try the validity of a corporate election.—*Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

A judgment which has been satisfied cannot be reviewed on appeal; hence, if persons to whom an estate was distri-

buted by a decree of court have received and receipted for their full share so distributed to them, they cannot appeal from such decree, and any appeal which they may attempt to prosecute may be dismissed on motion.—*In re Baby*, 87 Cal. 200, 25 Pac. 405, 22 Am. St. Rep. 239.

Section 3571. Orders made Without Notice may be Reviewed by the Judge: An order made out of court, without notice to the adverse party, may be vacated or modified without notice, by the judge who made it or may be vacated or modified on notice in the manner in which other motions are made.

1887 R. S. Sec. 4801.

Section 3572. Party Aggrieved may Appeal. Designation of Parties: Any party aggrieved may appeal in the cases prescribed in this Code. The party appealing is known as the appellant, and the adverse party as the respondent.

1887 R. S. Sec. 4802.

ADVERSE PARTY DEFINED: The term adverse party in Section 201 (4427) of our civil practice act has the same signification as to matters deemed excepted to as the term "aggrieved party" in Sec. 436 (4802) of the same act.—*Fox v. West*, 1 Idaho, 782.

STATE "PARTY AGGRIEVED": In this case the state was a "party aggrieved," and was entitled to an appeal under the provisions of Section 4802, Rev. St.—*State v. Eves* (Idaho), 53 Pac. 542.

JUDGMENT BY CONSENT, RIGHT OF APPEAL: Where, in a suit before a justice for \$150.00, being above the amount which justices have original jurisdiction, all the allegations of the complaint were denied, but to expedite an appeal defendant, by agreement of both parties, consented to a pro forma

judgment against him, reserving all his rights under an appeal, this consent does not deprive him of his right to be heard in a circuit court, and his appeal was improperly dismissed.—*Harvey v. Bunker Hill & Sullivan Mining Co.* 2 Idaho, 732, 24 Pac. 30.

Note.—Under the present status of the law, justices' court only has concurrent not exclusive jurisdiction below \$100.00, provision being simply that plaintiff shall not recover costs unless the amount recovered is equal to \$100.00.

An adverse party within the meaning of the statute regulating appeals is a party whose interest in relation to the subject of the appeal is in conflict with the reversal or modification of the judgment or order from which the appeal is prosecuted.—*Green v. Berge*, 105 Cal. 52, 38 Pac. 539, 45 Am. St. Rep. 25.

TO THE SUPREME COURT FROM DISTRICT COURT, WHEN AND HOW TAKEN.

Section 3573. Within what Time Appeal may be Taken: An appeal may be taken to the supreme court, from a district court.

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one year after the entry of judgment. But an exception to the decision or verdict on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment.

2. From a judgment rendered on an appeal from an inferior court, within ninety days after the entry of such judgment.

3. From an order granting or refusing a new trial from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to

dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment; and from an interlocutory judgment in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered on the minutes of the court, or filed with the clerk.

4. From a judgment rendered as an appeal for an order, decision or action of a board of county commissioners, within ninety days after the entry of such judgment.

1887 R. S. Sec. 4807; amended 1899, 5th Ses. p. 273; 1895, 3d Ses. p. 142.

Organization, jurisdiction and powers of supreme court, generally: Secs. 2983 to 2992.

Effect of appeal: Sec. 3310.

Order of court vacating judgment for passion or prejudice influencing verdict reviewable on appeal, but statement must be prepared: Sec. 3529.

Orders reviewable on appeal from judgment: Sec. 3590.

Exceptions, necessity for: Secs. 3515 and 3590.

Sub. 4. BOARD OF COUNTY COMMISSIONERS: Political Code Sec. 1611, providing that from a decision of a district court or judge (rendered upon appeal from the action of such board), either party may within five days appeal to the supreme court. The provision of Sub. 4, in so far as it conflicts with said provision of the Political Code, in its provisions limiting the time for appeal, would seem should control, for the reasons:

First—That it is contained in an act amending the Code of Civil Procedure, and of the section specifically providing the times within which appeals may be taken, and is a specific in contradistinction to a general, or incidental, provision.

Second—The provision of the Political Code is hardly within the scope of the title of the amending act wherein the provision is contained and is involved with other collateral matters.

Third—The limitation of five days is inconsistent with the general spirit and provisions of the Code relating to appeals and such preparatory steps as obtaining stenographers' notes, settling a bill of exceptions, moving for a new trial, etc., and would tend to render the remedy by appeal ineffectual.—First National Bank of Pocatello v. C. Bunting & Co. Bankers (Idaho), 63 Pac. 694.

DEFAULT JUDGMENTS, APPEALABLE: Judgments entered by a clerk on default, and those rendered by a court after a trial on issues, are equally final judgments within the meaning of the statutes concerning appeals.—Hardiman v. South Chariot Mining Company, 1 Idaho, 704.

JUDGMENT ON MOTION, CHANGE OF ATTORNEY: A motion to change attorneys in a suit pending is a special proceeding, and a judgment rendered on such motion is a final judgment, from which an appeal to this court may be taken.—Curtis v. Richards (Idaho), 40 Pac. 57.

APPEALS, FINAL ORDER: A final judgment is one that fully settles the rights of the parties to the action. A judgment or order of court determining the law applicable to the issues of an action, but leaving questions of fact unsettled, is not a final judgment, or such judgment as is reviewable on appeal.—Potter v. Talkington (Idaho), 49 Pac. 14.

FINAL JUDGMENT, WHAT CONSTITUTES: Upon the minutes of the court the following entry was made: "At this day, on motion of defendant's counsel, the court ordered this cause dismissed at plaintiff's costs, taxed at \$3.40." Held, this is not a final judgment. When there is no final judgment, no appeal can be taken.

APPELLATE JURISDICTION: When there is no judgment in the court below, this court has no jurisdiction.

SAME, OBJECTION TO JURISDICTION: An objection to jurisdiction may be made at any time.—Durrant v. Comegys, 2 Idaho, 809, 26 Pac. 755.

ORDER FOR JUDGMENT: The order for a judgment is not such a final judgment as an appeal can be taken from, under the statutes of this state.—Hodgkins v. Harris (Idaho), 43 Pac. 72.

ORDER SUSTAINING DEMURRER: An order sustaining a demurrer and dismissing an action is not an appealable order, and unless final judgment is rendered the appeal will be dismissed.—Ah Kle v. McLean, 2 Idaho, 812, 26 Pac. 937.

JUDGMENT OF NON-SUIT: A judgment of non-suit is a final judgment within the meaning of Idaho Code from which an appeal will lie.—Lalande v. McDonald, 2 Idaho, 283, 13 Pac. 347.

ORDER DISMISSING ACTION: No appeal can be taken from an order dismissing an action, or from an order of non-suit, until a judgment has been en-

tered.—*Boyd v. Steele*, Judge (Idaho), 59 Pac. 21.

DISMISSAL OF APPEAL, RECORD, FINAL JUDGMENT: Where the record on appeal fails to show a final order or judgment from which an appeal could be taken, the appeal will be dismissed.—*Adams v. McPherson*, 2 Idaho, 855, 27 Pac. 577; *Thiessen v. Briggs* (Idaho), 46 Pac. 829.

TIME OF TAKING APPEAL, BILL OF REVIEW: It is undoubtedly the law that a bill of review to reverse a decree erroneous upon its face, by analogy to the time for taking appeals, must be filed within one year from its enrollment, and the same rule applies to a bill brought for the same purpose where the decree itself shows no error, but which error is afterwards discovered, when the same period of time has elapsed, after the error was discovered.—*Hyde v. Lamberson*, 1 Idaho, 539.

SAME: A bill of review must be filed within the time within which an appeal could be taken from the judgment sought to be reviewed.—*McMillan v. Wooly* (Idaho), 51 Pac. 1029.

APPEAL NOT TAKEN IN TIME, DISMISSED: An appeal taken after the statutory time has elapsed will be dismissed.—*Scheller v. Small* (Idaho), 40 Pac. 53.

EXCEPTION TO INSUFFICIENCY OF EVIDENCE: On appeal from a judgment the evidence will not be reviewed, or exceptions to findings on the ground that they are not supported by the evidence considered, unless the appeal is taken within 60 days after the rendition of the judgment.—*Brady v. Linnehan* (Idaho), 51 Pac. 761.

EXCEPTION, VERDICT AGAINST LAW AND FACTS: An exception that "the verdict is against law, as applied to the facts in the case" cannot be reviewed on an appeal from the judgment, taken more than 60 days after the rendition of the judgment.—*Young v. Tiner* (Idaho), 38 Pac. 697.

DEFENDANT'S MOTION FOR NON-SUIT: The overruling of defendant's motion for a non-suit cannot be considered, for the reason that this appeal was not taken within 60 days after the rendition of judgment.—*Holt v. Spokane & P. Ry. Co.* (Idaho), 35 Pac. 39.

APPEALABLE ORDERS, OVERRULING MOTION FOR NEW TRIAL: The organic act of the territory does not prohibit the legislative assembly from authorizing an appeal from an order of the district court overruling a motion for a new trial.—*Shultz v. Keeler*, 2 Idaho, 305, 13 Pac. 481.

SAME, TIME, EXTENSION OF: The court cannot extend the time provided by statute within which to appeal from

an order granting or refusing a new trial.—*Hyde v. Harkness*, 1 Idaho, 623.

NEW TRIAL, DEFECTIVE PLEADINGS, PRACTICE: Where a party has not made a case in his pleadings that will support a judgment in his favor, and a motion for a new trial has been made and overruled, the proper practice is for the party urging such objection to move in arrest of judgment. In this way the attention of the court is called to the defective pleadings, and opportunity given to determine their sufficiency.—*Taylor v. Peterson*, 1 Idaho, 513.

ALIMONY, PENDENTE LITE: An order in an action for divorce awarding counsel fees and alimony is not appealable.—*Wyatt v. Wyatt*, 2 Idaho, 219, 10 Pac. 228.

ORDERS AFTER JUDGMENT: An order refusing to retax costs, if made after the rendition and entry of final judgment, can only be reviewed upon an appeal from the order.—*Emery v. Langley*, 1 Idaho, 694.

MOTION FOR STAY OF PROCEEDINGS: An order overruling a motion for a stay of proceedings under a void judgment may be appealed from (or brought to this court for review by writ of error), and such appeal brings under review the whole record in the case.—*Alexander & Co. v. Leland*, 1 Idaho, 425.

SPECIAL ORDER AFTER FINAL JUDGMENT: Under Section 4807 Rev. St. Idaho, appeal can not be taken from an interlocutory order made on the trial of an application for a special order after final judgment.

SPECIAL ORDER AFTER FINAL JUDGMENT: An interlocutory order, made in a trial on application for a special order after final judgment, is not "a special order after final judgment," within the meaning of Section 4807 of Rev. St.—*Connell v. Warren*, 2 Idaho, 855, 27 Pac. 730.

TIME OF TAKING: An appeal from an order made after judgment, to be effectual, must be taken within 60 days after the order was made, and entered on the minutes of the court, or filed with the clerk.—*Balfour v. Eves* (Idaho), 42 Pac. 508. So in an appeal from an order granting or refusing a new trial, the notice of appeal must be served on the adverse party or his attorney, and filed with the clerk, the order in which the acts are done is immaterial, within 60 days from entry of the order, or the same is filed with the clerk.—*Arthur v. Mounce* (Idaho), 42 Pac. 509.

ORDER OF BOARD OF COUNTY COMMISSIONERS: No appeal will lie from a judgment of the district court upon an appeal from an order of the board of county commissioners declar-

ing the result of an election. Remedy of the aggrieved party in such cases being by writ of error.—*Rupert v. Board of County Commissioners of Alturas County*, 2 Idaho, 21, 2 Pac. 718. This decision was upon Sec. 642, 11th session, which did not provide for the appeal from judgments in district courts upon appeal from board of county commissioners.

APPEALABLE ORDERS: No appeal will lie from an order of the county board of equalization reducing the amount of assessment of taxes.—*General Custer Mining Company v. Van Camp*, 2 Idaho, 44, 3 Pac. 22.

APPEAL FROM BOARD OF EQUALIZATION: No appeal will lie from a judgment of the district court upon an appeal from the board of county commissioners reviewing an assessment of taxes; remedy of the aggrieved party in such cases being by writ of error.—*Van Camp v. Board of Commissioners of Custer County*, 2 Idaho, 33, 2 Pac. 721.

Section as amended allows appeals from judgment upon appeals from board of county commissioners.

Sub. 1. An appeal from a judgment not taken within one year from the entry of the judgment is ineffectual, and will be dismissed.—*Henry v. Merguire*, 111 Cal. 1, 42 Pac. 387.

An appeal perfected before entry of the judgment is prematurely taken, and must be dismissed.—*McHugh v. Adkins*, 117 Cal. 228, 49 Pac. 5.

Where an appeal is taken from the judgment alone, more than sixty days after its rendition, no question as to the sufficiency of the evidence can be considered.—*Secord v. Quigley*, 106 Cal. 149, 39 Pac. 623; *Brooks v. S. F. & N. P. Railway Co.* 110 Cal. 173, 42 Pac. 570, and it is immaterial that an appeal, not taken within that period was taken within sixty days after notice of the rendition of the judgment.—*Fatjo v. Swansey*, 111 Cal. 628, 44 Pac. 225. See also *In re Levison*, 108 Cal. 450, 41 Pac. 483 and 42 Pac. 479; *Painter v. Painter*, 113 Cal. 371, 44 Pac. 689; *Wood v. Etiwanda Water Co.* 122 Cal. 152, 54 Pac. 726.

Sub. 3. **APPEALABLE ORDERS:** An order is a judgment or conclusion of the court upon any motion or proceeding by which affirmative relief is granted or relief is denied. An appeal lies from an order refusing to quash an execution under a statute giving an appeal from "any special order made after judgment."—*Gilman v. County of Contra Costa*, 8 Cal. 52, 68 Am. Dec. 290.

SUBSTITUTION: An order refusing

to vacate an order substituting a person as plaintiff in place of the original plaintiff is not appealable, and is only subject to review on appeal from the final judgment.—*Grant v. Los Angeles, Etc. Ry. Co.* 116 Cal. 72, 47 Pac. 872.

ATTACHMENT: An order of the court for the release of attached property on the ground that it is not liable to seizure under the writ is, in effect, an order dissolving an attachment and may, therefore, be appealed from.—*Risdon Iron Works v. Citizens' Trac. Co.* 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25.

An order confirming a sale on partition is appealable by the purchaser.—*Hammond v. Calleaud*, 111 Cal. 206, 43 Pac. 607.

Appeal. Order after judgment. Alimony.—See *White v. Superior Court*, 110 Cal. 54, 42 Pac. 471.

The certificate of a judge settling an engrossed statement on motion for a new trial does not constitute a special order made after final judgment, and is not an appealable order.—*Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599.

Where an order appealed from was actually made, but was not entered upon the record, the supreme court may grant leave to have the order entered nunc pro tunc and certified up.—*Lee Chuck v. Quan Wo Chong Co.* 81 Cal. 222, 22 Pac. 594, 15 Am. St. Rep. 50.

FINAL JUDGMENTS IN EQUITY, WHAT ARE: If, after a decree has been entered, no further questions can come before the court except such as are necessary to be determined in carrying the decree into effect, it is final; otherwise it is interlocutory.—*Arnold v. Sinclair*, 11 Mont. 556, 29 Pac. 340, 28 Am. St. Rep. 489.

An appeal may be taken to a higher court, without moving for a new trial in the court below.—*Innis v. The Steamer Senator*, 1 Cal. 459, 54 Am. Dec. 305.

An appeal from an order refusing a new trial brings up the whole record, where the order overruling a motion for a new trial was made within a year from the rendition of judgment, and the notice of appeal was filed within sixty days from the date of the order overruling the motion for a new trial, but more than one year from the rendition of the judgment; and the supreme court, if satisfied that the court below erred in refusing a new trial, will reverse the order and grant a new trial; the effect of which will be to vacate the judgment.—*Walden v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135; *Wilson v. Bartlett* (Idaho), 62 Pac. 415.

Section 3574. Appeal, how Taken, Notice: An appeal is taken by filing with the clerk of the court in which the judgment

or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose, unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing.

1887 R. S. Sec. 4808.

Exceptions, necessity for: Secs. 3515 and 3590.

Time to serve notice of appeal can not be extended by the court: Sec. 3744.

Method of serving notice on attorneys or parties, generally: Chap. CLXVIII, Secs. 3711 to 3717.

Insufficient undertaking and provision for filing new, upon motion to dismiss in supreme court: Sec. 3588.

Three things are necessary in order to perfect an appeal, and to give the supreme court jurisdiction: 1. A notice of appeal must be filed, as required by law. 2. A copy of the notice must be served on the adverse party, or his attorney. 3. An undertaking must be filed within five days after filing notice of appeal. By this law, the filing of an undertaking within the time specified is absolutely necessary to give effect to the appeal.—Shissler v. Crooks, 1 Idaho, 369.

SERVICE OF NOTICE OF APPEAL: The service of a copy of a notice of appeal must be contemporaneous with, or after the filing of the notice; hence, the service upon the adverse party before filing of the notice is not a sufficient service.—Slocum v. Slocum, 1 Idaho, 589.

JURISDICTIONAL FACTS: Before the appellate court can take jurisdiction of an appeal, the filing of the notice of the service, or a copy thereof, as prescribed by statute, must be had, and before the notice is filed, it possesses none of the elements of a notice, and consequently there can be no copy of it.—Slocum v. Slocum, 1 Idaho, 589.

FILING UNDERTAKING, SERVING NOTICE: If the undertaking on appeal is filed before the notice of appeal is served, the appeal is not effectual for any purpose, and it must be dismissed.—Clark v. Lowenberg, 1 Idaho, 654.

UNDERTAKING ON APPEAL. TIME OF FILING: Section 4808, Rev. St. Idaho requires the undertaking on appeal to be filed within 5 days after the service of notice of appeal in order to render the appeal effectual for any purpose.

SAME, FILING AFTER STATUTORY LIMIT: This court has no juris-

diction or authority to permit the undertaking on appeal to be filed after the 5 days have expired.—Brown v. Hanley, 2 Idaho, 950, 28 Pac. 425.

"ADVERSE PARTY" CONSTRUED: By the words "adverse party" as used in this section, is meant every party whose interest in the subject matter of the appeal will be affected by a modification or reversal of the judgment or order appealed from, irrespective of whether he is a plaintiff, or defendant or intervenor. Held, that certain co-defendants who could not be affected by the result of the appeal, were not "adverse parties," on whom notice of appeal must be served.—Aulbach v. Dahler (Idaho), 43 Pac. 192.

CO-DEFENDANT, ADVERSE PARTY: In an appeal by one of the two defendants from a judgment and decree of foreclosure, wherein a joint judgment was rendered against both, the defendant not joining in the appeal, is an adverse party, and should be served with notice of appeal. Rehearing denied.—Lewiston Nat. Bank v. Tefft (Idaho), 53 Pac. 271.

SAME, DISMISSAL: Where, in an action to foreclose a mortgage against the joint makers of the same, judgment is entered against them jointly and one defendant appeals but does not serve notice of appeal on his co-defendant, the appeal will be dismissed, as such co-defendant is an adverse party within the meaning of Section 643, providing that notice of appeal must be served on the adverse party.—Jones v. Quantrell, 2 Idaho, 145, 9 Pac. 418.

W. appealed from a joint judgment against her and G. but failed to serve notice of appeal on G. Held, that G. was an adverse party to W. on the appeal, and that notice of appeal should have been served on G.—Lydon v. Goddard (Idaho), 51 Pac. 459.

SERVICE ON ALL PARTIES AFFECTED: Any party to an action, whether plaintiff or defendant, may appeal; but the notice of appeal must be served upon all parties who would be affected by any order of the appellate court, whether said parties be plaintiffs or defendants or intervenors.—Coffin v. Edginton, 2 Idaho, 595, 23 Pac. 80.

PARTIES VERY NUMEROUS, DILIGENCE REQUIRED: Where the

parties to a case are very numerous and great diligence shown in making service, an appeal not dismissed upon motion, suggesting that the notice of appeal was not served on all the adverse parties or their attorneys.—*Kirk v. Bartholomew*, 2 Idaho, 1087-1094, 29 Pac. 40.

SERVICE ON FOREIGN CORPORATIONS: When a foreign corporation has no resident attorney on whom a notice of appeal may be served, such notice may be served on the resident agent of such corporation on whom process may be legally served.—*Vermont Loan & Trust Co. v. McGregor* (Idaho), 51 Pac. 102.

DEATH OF PARTY AFTER JUDGMENT: After judgment was rendered, but before notice of appeal was filed or served, one of the defendants died. No substitution having been made, held, that all proceedings on the appeal were null and void as to the representatives of the deceased defendant.—*Coffin v. Edgington*, 2 Idaho, 595, 23 Pac. 80.

SAME, ATTORNEYS, POWERS TO BIND REPRESENTATIVES: If a party to an action die after the rendition of judgment, and before filing and serving notice of appeal, the authority of the deceased's attorney to act terminates any subsequent action of the attorney, before substitution, will not bind the representatives of the deceased, or any other party in interest.—*Coffin v. Edgington*, 2 Idaho, 595, 23 Pac. 80.

RECORD, SERVICE OF NOTICE: The record of a case on appeal must affirmatively show that the notice of appeal was filed in the court below and served upon the adverse party or his attorney within the time required by the statute.

SAME, APPELLATE JURISDICTION: Without these requirements of the statute are complied with, this court has no jurisdiction.

Objection for want of jurisdiction may be made at any time.—*Tootle v. French*, 2 Idaho, 745, 25 Pac. 1091.

RECORD MUST SHOW SERVICE: The record must affirmatively show the service of the notice of appeal on the adverse party or his attorney. Section 4808 Rev. St. 1887 is mandatory, and the record must affirmatively show that the provisions have been complied with, to give this court jurisdiction.—*Adams v. McPherson* (Idaho), 34 Pac. 1095.

REGULARITY NOT PRESUMED: The regularity of the proceedings by which an appeal is taken must be shown affirmatively. Nothing will be presumed in favor of the same.—*Anderson v. Knott*, 1 Idaho, 626.

SAME, EFFECT OF STIPULATIONS: When the record fails to show

a compliance with the statutes or the rules of this court in the taking of an appeal, the appeal will be dismissed; and such failure can not be cured by stipulation.—*Penny v. Nez Perce County* (Idaho), 43 Pac. 570.

SUFFICIENCY OF CLERK'S CERTIFICATE: The certificate of the clerk of the district court that the appeal was "duly taken to the supreme court by the filing and service of the proper notice" will not cure any defect in the record. It is the duty only of the clerk to certify to the facts as they exist, in relation to the notice and its service, and it is the province of the court to determine whether these facts constitute legal service.—*Moore v. Koubly*, 1 Idaho, 55.

ADMISSION OF SERVICE: Admission of service of notice on appeal by one defendant, within the time required by law for service of notice, is equivalent to service. And where party voluntarily appears in court he waives irregularity of service and will be subject to the same jurisdiction as if brought in by regular process.—*Wilson v. Wilson* (Idaho), 57 Pac. 708.

VOLUNTARY APPEARANCE: A party appearing generally in a case on appeal in this court, thereby waives all informalities in the notice of such appeal, or want of service of the same.—*Moore v. Koubly*, 1 Idaho, 55.

An appeal may be taken from a part of a judgment under a statute authorizing an appeal from a judgment, or any part thereof. An order striking out a part of an answer is reviewable upon appeal from a final judgment, though no formal bill of exceptions has been presented or settled.—*Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461.

An appeal from a judgment and from an order denying a new trial may be taken by one notice by two different parties, though one of such parties appeals from the judgment only, and the notice is sufficient if it states who are appellants and what they appeal from.—*Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243.

Service of notice of appeal on adverse party.—*Barnhart v. Edwards*, 111 Cal. 428, 44 Pac. 160; *Vincent v. Collins*, 122 Cal. 387, 55 Pac. 129.

Service of notice of appeal upon an attorney after the death of his client can not bind the representatives of the latter because the authority of the attorney terminates with the life of his client, but if such attorney, being afterwards retained by the representatives of the deceased defendant, by concealing the fact of such death, and by the failure to object to the jurisdiction of the appellate court at the proper time,

and for the fraudulent purpose of preventing the proper service of such notice, delays making objection until it is too late to remedy the defect, the representatives of the deceased are es-

topped from contending that such notice was not properly served.—*Moyle v. Landers*, 78 Cal. 99, 20 Pac. 241, 12 Am. St. Rep. 22.

UNDERTAKING AND SURETIES.

Section 3575. Undertaking or Deposit on Appeal:

'The undertaking on appeal must be in writing, and must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal; *Provided*, That when more than one appeal in the same action, whether from the judgment and an appealable order or orders, or from two or more appealable orders, are taken at the same time, but one such undertaking or deposit for damages and costs need be filed or made.

1887 R. S. Sec. 4809.

Note: Prior to R. S. 1887 this section did not contain the proviso relating to several appeals. Decisions prior to that date seemed to have held a separate undertaking necessary and since then the decisions are uniform that the undertaking must specifically refer to each appeal, both in recital and in its conditions imposing liability.

The undertaking mentioned in this section is ineffectual as a stay of proceedings in cases not specially provided for in Sec. 3576 et seq. and 3583.

Filing new undertaking in appellate court: Sec. 3588.

Undertaking exceeding two thousand dollars sureties may justify for less than whole amount: Sec. 3749.

State, county and officers are not required to give: Sec. 3750.

Statutory form applicable to all undertakings: Sec. 3752.

Surety on undertaking, paying judgment against principal, subrogated to rights of judgment creditor in judgment: Sec. 3751.

If an undertaking on appeal is filed before the notice of appeal is filed and served, the appeal will be dismissed on motion.—*People v. McCarty*, 1 Idaho, 371.

RECORD MUST SHOW UNDERTAKING FILED: The record on appeal must show that an undertaking was filed or waived.—*Rice v. French* (Idaho), 35 Pac. 173.

DISMISSAL, UNCERTAINTY OF UNDERTAKING: Where two appeals are taken, one from the judgment and the other from an order denying a new trial, an undertaking promising in consideration of such appeal, to pay all damages and costs which may be awarded against appellant on the ap-

peal, not specifying which one, is void for uncertainty as to both appeals and both will be dismissed.—*Cronin v. Bear Creek Gold Mining Co.* 2 Idaho, 1143, 32 Pac. 53; *Matheson v. Leland*, 1 Idaho, 712; *Motherwell v. Taylor*, 2 Idaho, 139, 9 Pac. 417; *Eddy v. Vanness*, 2 Idaho, 93, 6 Pac. 115; *Haskins v. Woodin* (Idaho), 38 Pac. 933; *Schiller v. Small* (Idaho), 40 Pac. 53; *Weil v. Sutter* (Idaho), 44 Pac. 555; *Kelly v. Leachman* (Idaho), 51 Pac. 407; *Rosenbaum v. Small* (Idaho), 40 Pac. 54.

SAME: On an appeal from a judgment and from an order sustaining a demurrer to defendant's amended answer, an undertaking which provides, "that said appellant will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof," only, without reference to either appeal, is insufficient.—*Wallace v. McKinley* (Idaho), 53 Pac. 104.

APPEALS DESIGNATED, WHEN SUFFICIENT: An undertaking on appeal under Section 4809, Rev. St. 1887, intended to apply to more than one appeal, must designate or specify each appeal, and will not be construed to apply to appeals not specified therein.—*Young v. Tiner* (Idaho), 38 Pac. 697; *Sebree v. Smith*, 2 Idaho, 327, 16 Pac. 477; *McCoy v. Oldham*, 1 Idaho 435.

UNDERTAKING HELD GOOD UNDER AMENDMENT 1887: An undertaking on appeal, which specifically recites that the appeal is from both the judgment and the order overruling the motion for a new trial, and obligates the sureties to pay the penalty in the event of a judgment against the appellants or the dismissal of the appeals, is sufficient under the statutes of Idaho.—*Vane v. Towle* (Idaho), 50 Pac. 1004.

Section 3576. Undertaking on Appeal from a Money Judgment: If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant by two or more sureties to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof be affirmed or the appeal be dismissed the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent, in his favor against the sureties, for such amount together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from, be for a greater amount than two thousand dollars, and the sureties do not state in their affidavits of justification accompanying the undertaking that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as in their affidavits, they may state they are severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken pursuant to the stipulations herein designated. When the judgment or order appealed from, is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking, must be made payable in the same kind of money or currency.

1887 R. S. Sec. 4810.

Deposit in lieu of undertaking: Secs. 3575 and 3582.

Qualifications of sureties: Sec. 3749.

Specified kind of money: Sec. 3506.

There can be no money judgment entered in an action to foreclose a mortgage lien, except as provided in Section 4520, Rev. St. The judgment in this case was a money judgment, and came under the provisions of Section 4810, Rev. St. in regard to money judgments.

Section 4, Rev. St. can hardly be invoked in this case. Section 3925, not applicable in this case. The Code has clearly and distinctly pointed out the procedure to be followed in cases, such as that under consideration in Sections 4809-4817, Rev. St.—*Barnes v. Buffalo Pitts Co. (Idaho)*, 57 Pac. 267.

On appeal from a judgment for foreclosure of a mortgage upon personal property, an undertaking in the sum of \$300 is sufficient to stay the execution of the judgment pending the appeal, and, if the district court requires the appellant to give further undertak-

ing to stay execution, such undertaking is void, and can not be enforced against the sureties therein.—*Barnes v. Buffalo Pitts Co. Idaho*), 57 Pac. 267.

PLEADINGS AND PROOF ON SUPERSEDEAS BONDS: In an action upon a supercedas bond in a case where the proceedings have been stayed by the bond, it is not necessary to allege or prove that the action in which the bond was given was an appealable one.—*Ray v. Ray*, 1 Idaho, 705.

This section is not applicable to appeals where there is no personal judgment against appellant.—*Boob v. Hall*, 105 Cal. 413, 38 Pac. 977.

Undertaking on appeal from order refusing to strike out a cost bill.—See *Reay v. Butler*, 118 Cal. 113, 50 Pac. 375.

Proceedings to enforce a judgment are stayed by a sufficient undertaking given on appeal from an order denying a new trial, with the same effect as a like undertaking given upon appeal from the judgment.—*Owen v. Pomona Land, Etc. Co.* 124 Cal. 331, 57 Pac. 71.

Section 3577. Appeal from Judgment for Delivery of Property: If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court or judge thereof may appoint; or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

1887 R. S. Sec. 4811.

Section 3578. Appeal from Judgment Directing Execution of Conveyance: If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court.

1887 R. S. Sec. 4812.

Section 3579. Undertaking on Appeal Concerning Real Property: If the judgment or order appealed from, direct the sale or delivery of possession of real property the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

1887 R. S. Sec. 4813.

Deposit with clerk: Secs. 3575 and 3582.

Undertaking: Sec. 3575.

Qualification of sureties: Sec. 3749.

Waste: Secs. 3385 and 3386.

Plaintiff put in possession pending appeal, eminent domain proceedings, giving bond, etc.: Sec. 3857.

Supersedeas, judgment, forcible entry and detainer, not stayed unless court specially directs: Sec. 3991.

Under this section the judge of the court has power to fix the amount of the bond, on appeal from a decree of foreclosure, in all the three matters

mentioned in the section, namely: Waste, use and occupation, and deficiency.—*Boob v. Hall*, 105 Cal. 413, 38 Pac. 977.

Bond to stay execution, foreclosure of mechanic's lien.—See *Central L. & M. Co. v. Center*, 107 Cal. 195, 40 Pac. 324.

Bond for waste and deficiency, measure of liability of sureties.—See *Ogden v. Davis*, 116 Cal. 32, 47 Pac. 772.

The judge of the trial court may fix the amount of the stay bond upon appeal in foreclosure suits, upon an ex parte application.—*Hubbard v. University Bank*, 120 Cal. 632, 52 Pac. 1070.

Section 3580. Stay of Proceedings. Effect of Appeal: Whenever an appeal is perfected, as provided in the preced-

ing Sections of this Chapter, it stays all further proceeding in the court below, upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from. And the court below may, in its discretion, dispense with or limit the security required by this Chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right. An appeal does not continue in force and attachment, unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained and unless, within twenty days after the entry of the order appealed from, such appeal be perfected.

1887 R. S. Sec. 4814.

Condemnation proceedings for right of way for development of mining rights and possession pending appeal: Sec. 3869.

Appeal, election contest, supersedeas bond: Secs. 3816 and 3817.

Where an appeal is perfected from an appealable order, the court below can not proceed in the cause until the appeal is heard and determined.—*Kaufman v. Superior Court*, 108 Cal. 446, 41 Pac. 476; *Stateler v. Superior Court*, 107 Cal. 536, 40 Pac. 949; *Hubbard v. University Bank*, 120 Cal. 632, 52 Pac. 1070.

This section does not provide that the judgment shall be suspended, but only that no further proceedings shall be had upon the judgment appealed from, or upon the matters embraced therein.—

Rogers v. Superior Court, 126 Cal. 183.

When a judge has directed a stay of proceedings, and an undertaking on appeal has been executed pursuant to his directions the lower court has no further control over the matter, and can not discharge the order staying proceedings after it has been complied with.—*Lee Chuck v. Quan Wo Chong Company*, 81 Cal. 222, 22 Pac. 594, 15 Am. St. Rep. 50.

When a judgment has been entered against a corporation forfeiting its charter and franchises, and an appeal has been taken therefrom, and a bond given sufficient to stay the execution of judgment, a further order entered in the action, appointing a receiver for the purpose of carrying the judgment into effect, is void.—*Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192.

Section 3581. Undertaking may be in one Instrument or Several: The undertakings prescribed by Sections 3575, 3576, 3577 and 3579, may be in one instrument or several, at the option of the appellant.

1887 R. S. Sec. 4815.

Section 3582. Justification of Sureties on Undertaking: The adverse party may except to the sufficiency of the sureties to the undertakings mentioned in Sections 3575, 3576, 3577 and 3579, at any time with thirty days after the filing of such undertaking; and, unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, or the probate judge of the county, upon five days' notice to the respondent, of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this Chapter, a deposit in the court below of the amount of the judgment appealed

from, and three hundred dollars, in addition, is equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

1887 R. S. Sec. 4816.

Section 3583. Undertaking in Cases not Specified:

In cases not provided for in Sections 3576, 3577, 3578 and 3579, the perfecting of an appeal by giving the undertaking, or making the deposit mentioned in Section 3575, stays proceedings in the court below, upon the judgment of the order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court. And except, also, where it adjudges the defendant guilty of usurping or intruding into, or unlawfully holding a public office, civil or military, within this State. And except, also, where the order grants, or refuses to grant, a change of the place of trial of an action.

1887 R. S. Sec. 4817.

The stay of proceedings pending an appeal has the effect of keeping matters in the condition in which they were when the stay of proceedings was

granted; and operates so as to prevent any future change in the condition of the parties. — *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580.

TRANSCRIPT AND DISMISSAL.

Section 3584. What Papers to be used on Appeal from Judgment: In an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case, upon which the appellant relies. Any statement used on motion for a new trial, or settled after decision of such motion, when the motion is made upon the minutes of the court, as provided in Section 3528 or any bill of exceptions settled, as provided in Section 3518 or 3519, or used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial.

1887 R. S. Sec. 4818.

Judgment, what orders can be reviewed on appeal from: Sec. 3590.

Record upon exceptions deemed taken, and what may be reviewed upon the records and files without incorporating in bill of exceptions: Sec. 3516.

Appellate court may settle exceptions, where right denied in court below, procedure to obtain: Sec. 3515.

An appeal is perfected when the proper notice has been served and filed, and a proper undertaking is filed within the time required by law. And under the rules of this court, the transcript of the record on appeal must be served and filed within 60 days after appeal is perfected.—*Hattibaugh v. Vollmer (Idaho)*, 46 Pac. 831.

Under this and the preceding section a transcript on appeal may be served by

mail.—*Hattibaugh v. Vollmer (Idaho)*, 46 Pac. 831.

PRACTICE, TIME TO FILE TRANSCRIPT: A transcript filed on Friday preceding Monday, the first day of the term of this court, is in time under the rules of the court.—*Sebree v. Smith*, 2 Idaho, 327, 16 Pac. 477.

The time for filing the transcript on appeal does not begin to run until the notice of appeal is served and filed, and the undertaking on appeal is filed.—*Hattibaugh v. Vollmer (Idaho)*, 46 Pac. 831.

A record on appeal which does not comply either with the statutes or with the rules of this court will not be considered.—*State v. O'Donald (Idaho)*, 39 Pac. 556.

TRANSCRIPT: Nothing in a transcript brought to the appellate court can be considered, unless by provisions

of the statutes, or the order of the judge, it is made a part of the record of the case. Of what the record consists, considered.—*Ramsay v. Hart*, 1 Idaho, 423.

RECORD ON APPEAL: On appeal from a judgment, without a statement or bill of exceptions, nothing belongs to the record except the judgment roll, and no question outside of the record can be considered by the appellate court.—*Ray v. Ray*, 1 Idaho, 705.

JUDGMENT ROLL, WHAT CONSTITUTES: The papers constituting the judgment roll are specified in Section 221 (3509) of the Civil Practice act. Papers not enumerated therein can not properly be inserted in the transcript, and if placed there, can constitute no part of the record.—*Graham v. Linnehan*, 1 Idaho, 780.

APPEAL, TRANSCRIPT: When the transcript contains matter not properly a part thereof, such improper matter will be stricken out on motion.—*Rich v. French* (Idaho), 35 Pac. 173.

Rule 6 of the rules of this court, requires the parties to prepare printed briefs of the points and authorities, relied upon, and in citing cases from public reports requires the names of the parties as they appear in the title of the case, as well as the book and pages to be given.—*Cantwell v. McPherson* (Idaho), 34 Pac. 1095.

RECORD ON APPEAL, BILL OF EXCEPTIONS: To entitle a bill of exceptions to be considered in this court, it must be settled and signed by the district judge.—*Meinert v. Snow*, 2 Idaho, 851, 27 Pac. 677.

TRANSCRIPT, APPEAL FROM MOTION DENYING NEW TRIAL: An affidavit must be properly identified as having been used on such motion or it will not be considered on appeal.—*Bonner v. Powell* (Idaho), 61 Pac. 138.

OMISSION, MISTAKE, RESETTLEMENT: When an omission or mistake has occurred in the settlement of a bill of exceptions, the judge may, upon proper application, allow a resettlement thereof, provided that it is asked before the transcript is sent to this court, and the mistake or omission claimed is shown by documentary evidence, or is not denied by the adverse party. But if such omission or mistake rests in the recollection of judge or counsel, and not admitted by the adverse party, a correction or resettlement should be denied.—*Griffiths v. Montandon* (Idaho), 39 Pac. 195.

OBJECTIONS TO BILL OF EXCEPTIONS: If a bill of exceptions is presented for settlement, after the trial of the cause, and is certified to as correct by respondent's attorneys, and such bill is thereafter settled by the judge

and used on the hearing of the motion for a new trial, it is too late for the respondent to raise the objection for the first time in this court that such bill was not settled in time.—*Stufflebeam v. Montgomery*, 2 Idaho, 763, 26 Pac. 125.

ASSIGNMENT OF ERROR, EXCEPTIONS WAIVED: All exceptions taken in the court below will be treated as waived, unless the matters so excepted to are assigned as errors in this court.—*Purdy v. Steel*, 1 Idaho, 216.

STATEMENT, APPEAL FROM JUDGMENT REVIEW: A statement made on motion for a new trial may be considered on an appeal from the judgment, for the purpose of determining whether any errors in law were committed by the court below in the progress of the trial.—*Forsythe v. Richardson*, 1 Idaho, 459.

SAME, WHEN NOT AVAILABLE: If it does not appear from the statement on a motion for a new trial, that any exceptions were taken at the trial to any ruling of the court, the statement is useless on an appeal from the judgment.—*Forsythe v. Richardson*, 1 Idaho, 459.

SAME, NO MOTION MADE: Under Section 4818, Rev. St. Idaho, providing that any statement used on motion for a new trial may be considered on an appeal from a final judgment, what purports to be a statement on motion for a new trial can not be considered, it not appearing that any motion for a new trial was made.—*Stiffy v. Essler* (Idaho), 55 Pac. 239.

SAME, MATTERS REVIEWABLE: A statement used on motion for a new trial, and made part of the judgment roll, may be used on appeal from the judgment, if not taken within 60 days after the rendition thereof, for the purpose of determining whether the trial court made any errors in law during the progress of the trial.

An exception to the verdict, on the ground of the insufficiency of the evidence to justify it, can not be reviewed on an appeal from the judgment, unless the appeal is taken within 60 days after the rendition of the judgment.

An exception that "the verdict is against law, as applied to the facts proven in the case," can not be reviewed on an appeal from the judgment, taken more than 60 days after the rendition of the judgment.—*Young v. Tiner* (Idaho), 38 Pac. 697.

Every transcript on appeal should contain all the matters on which the cause is to be determined, and it is not proper for counsel to make another transcript a part of the case by stipulating that the evidence and findings in such other transcript, so far as per-

tinent, shall be considered in the case on appeal.—*Spangler v. San Francisco*, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158.

A bill of exceptions settled for one purpose may be used for another. Hence, though it was presented and settled for the purpose of being used on a motion to vacate a judgment, it constitutes a part of the record on appeal from such judgment, and may require its reversal, if thereby error, pre-

judicial to the defendant, is disclosed.—*Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147.

If case be submitted upon stipulated facts without reserving questions of competency, relevancy, or admissibility, of any fact in the statement, the question can not be raised in the appellate court that such facts are not properly before the court.—*Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

Section 3585. Papers Used on Appeal from Judgment. Order: On appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below.

1887 R. S. Sec. 4819.

Transcript: Secs. 3584 and 3587.

Exceptions: Sec. 3590.

Lost papers, supplying: Sec. 3738.

Section 3586. Record Required on Appeal from Order Granting or Refusing New Trial: On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in Section 3528 of this Code.

1887 R. S. Sec. 4820.

Record on appeal from motion for new trial: Sec. 3528.

EXCEPTIONS MUST BE PRESERVED: Exceptions must be taken to an order overruling a new trial and preserved in the record, if a party wishes to avail himself of the error in the appellate court.—*Taylor v. Peterson*, 1 Idaho, 513.

SAME, EXAMINATION OF EVIDENCE, STATEMENT: The appellate court will not look into a statement with a view to determine therefrom whether the evidence will support the findings or the judgment, unless a party

has placed himself in a position to object to an order of the court overruling a motion for a new trial by proper exceptions, any further than it will where no appeal has been taken from such order.—*Taylor v. Peterson*, 1 Idaho, 513.

NEW TRIAL GRANTED, RECORD: Where the record does not show the grounds upon which a new trial was granted, and no error warranting a new trial is apparent from the record, the order granting a new trial will be reversed.—*Lowe v. Long* (Idaho), 47 Pac. 93, affirmed; *Sweetser et al. v. Mellick* (Idaho), 51 Pac. 985.

Section 3587. Copies and Undertakings, how Certified: The copies provided for in the last three Sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk or attorneys, that an undertaking on appeal, in due form, has been properly filed or a stipulation of the parties waiving an undertaking.

1887 R. S. Sec. 4821.

On an appeal from an order denying a motion, a certificate from the clerk of the court in which the action was pending "that the foregoing transcript contains a full, true, and correct copy of all papers used on the motion" is a compliance with Rev. St. Section 4821, providing that copies of papers required on appeal must be certified to be correct by the clerk or the attorneys.—

Simmons Hardware Co. v. Alturas Commercial Co. (Idaho), 39 Pac. 553.

Affidavits used on motions, which are incorporated in the transcript on appeal, must have the certificate of the judge or the clerk, that they were the affidavits used on the hearing of the motion.—*Goodman v. Minear Mining and Milling Company*, 1 Idaho, 131; see also *Bonner v. Powell* (Idaho), 61 Pac. 138.

Certificate of counsel for respective parties to transcript, to the effect that the transcript is correct and contains all the evidence, held sufficient.—*Wilson v. Wilson* (Idaho), 57 Pac. 708.

STATEMENT, AUTHENTICATION: An agreement by the respective parties to an action that a certain document is the statement in the case is, substantially, an agreement that such statement is correct.—*Moore v. Taylor*, 1 Idaho, 583.

REFERENCE TO PAPERS: An intelligent and definite reference in a statement to papers and exhibits by letters or numbers as attached to and constituting a part of the statement, is sufficient, without any incorporation of the same at length into the statement.—*Moore v. Taylor*, 1 Idaho, 583.

IDENTIFICATION OF PAPERS: Where affidavits, depositions, or minutes of the court are incorporated into a statement either in haec verba or by appropriate reference, it is unnecessary to have any further identification of them.—*Moore v. Taylor*, 1 Idaho, 583.

CERTIFICATION OF TRANSCRIPT, COSTS: Appellant's attorney presented to the attorney for respondent a

transcript on appeal, for certification, and the attorney for the respondent refused to certify the transcript, or to point out any errors therein. Held, that the appellant should recover the cost of procuring a certification of the transcript from the respondent. *Sullivan, C. J. dissenting.*—*Lydon v. Goddard* (Idaho), 51 Pac. 459.

Defendant's attorney having served notice of withdrawal from case, on request and refusal by him, to certify transcript, creates no liability for costs.—*Bonner v. Powell* (Idaho), 61 Pac. 138.

When the clerk certifies that a sufficient undertaking on appeal, in due form of law, has been filed, the appeal will not be dismissed on motion, unless a certified copy of such undertaking is produced, and it is thus shown that the undertaking is not in due form of law.—*Wilson v. Wilson et al.* (Idaho), 57 Pac. 708.

The record on appeal must show that an undertaking on appeal, in due form, has been properly filed, or that the same has been waived by stipulation of the parties.—*Rich v. French et al.* (Idaho), 35 Pac. 173.

Section 3588. When Appeal may be Dismissed: If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon if a good and sufficient undertaking approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal.

1887 R. S. Sec. 4822.

APPEAL, ATTEMPT TO TAKE, DISMISSAL: The defendant was convicted of vagrancy in the police court of the city of Pocatello. An attempt was made to take an appeal, but it seems from the record that none of the requisites of the statute necessary to the taking of the appeal were complied with. No appearance in this court is made by or on behalf of the appellant. The appeal is dismissed.—*State v. Steptoe* (Idaho), 35 Pac. 690.

Where the defendant fails to furnish the requisite papers and fails to furnish any sufficient excuse therefor, the appeal should be dismissed.—*Caldwell v. Ruddy*, 1 Idaho, 760.

DISMISSAL OF APPEAL, FAILURE TO FILE TRANSCRIPT: The time for filing transcript expired November 19, 1891. On January 16, 1892, respondents moved to dismiss appeal, no transcript having been filed, no sufficient cause being shown to excuse laches of appellant. Motion allowed. — *Mahoney v. Marshal*, 2 Idaho, 1065, 29 Pac. 110.

DISMISSAL OF APPEAL, TYPE-WRITTEN COPY OF TRANSCRIPT:

The filing of a typewritten copy of a transcript in a civil case, without complying with the provisions of paragraph 10 of rule 27 of this court (32 Pac. xi.) by depositing with the clerk funds sufficient to pay the expenses of printing the same, or making arrangements with the clerk therefor, will not avail.—*Buckingham v. Reid* (Idaho), 48 Pac. 1069.

APPEAL, DISMISSAL, FAILURE TO FILE TRANSCRIPT: Failure to file transcript within the time prescribed by the rules of the court is ground for dismissal of appeal for cause shown, but such failure may be excused for cause shown.

SAME, DEFAULT OF OFFICER OF THE COURT: Parties litigant should not be made to suffer from the default of an officer of the court when due diligence is shown. — *Westheimer v. Thompson*, 2 Idaho, 1137, 31 Pac. 797.

Where the transcript fails to show a compliance with the provisions of the statute or the rules of this court in the matter of appeals, the appeal will be dismissed.—*Pence v. Lemp* (Idaho), 43 Pac. 75.

MOTION TO DISMISS APPEAL, FILING TRANSCRIPT: Motion to dismiss appeal under rule 2 for the reason that transcript was not filed and served in time required by rule 2. Held, that transcript was filed and served within the time required by said paragraph 7.—*Miller v. Pine Mining Co.* 2 Idaho, 1140, 31 Pac. 802.

Upon a motion to dismiss an appeal by reason of failure of appellant to comply with the rules of the court with reference to filing due service of transcript and briefs, affidavits tending to excuse such laches must be presented on the hearing of the motion, where notice of the hearing has been served on appellants. It is too late to present such affidavits on a motion to reinstate the cause, after motion to dismiss has been heard and allowed.—*Jacobs v. Shenon* (Idaho), 39 Pac. 193.

APPEAL, REVIEW: In an action where relief is granted both parties, on motion to dismiss the appeal under rule 3 of the supreme court, the certificate of the clerk below under rule 4, not showing the nature and substance of the judgment appealed from. Held, that such certificate will not justify the dismissal of the appeal; also that rule 3 is directory, and gives no right to a party to demand its enforcement; also that the court will not dismiss an appeal under rule 3, unless it be made to appear that justice requires such dismissal.—*Dunniway v. Lawson*, 2 Idaho, 600, 23 Pac. 78.

REINSTATEMENT, AFFIDAVIT OF MERIT: Upon a motion to reinstate a cause upon the calendar once dismissed, the affidavit should show apparent merit.—*Jacobs v. Shenon* (Idaho), 39 Pac. 193.

SUFFICIENCY OF AFFIDAVIT. SAME: Where transcript on appeal not filed within 60 days as required by paragraph 7, rule 4 of this court, and appeal dismissed on respondent's motion; motion to restore cause on affi-

davit showing that transcript was placed in hands of attorney for appellants before the expiration of 60 days, but that on account of pressure of business and inadvertence, plaintiff failed to file the same in time. Held, showing not sufficient to reinstate appeal.—*Fahey v. Belcher*, 2 Idaho, 1076, 29 Pac. 112.

SUFFICIENCY OF BOND, DISMISSAL: Where an appeal is taken both from the judgment and from an order denying a motion for a new trial, an undertaking reciting that it is given on such appeal is void for uncertainty, and both appeals will be dismissed.

FILING INDEMNITY BOND ON HEARING: In such cases the filing of two good and sufficient undertakings on a hearing of a motion to dismiss, will not cure the defect.—*Motherwell v. Taylor*, 2 Idaho, 139, 9 Pac. 417.

An appeal from a judgment refusing to annul a marriage, if taken too late, must be dismissed, and an objection to the allowance of alimony cannot be considered.—*Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756, 52 Am. St. Rep. 180.

An appeal will not be dismissed because statement on motion for a new trial was not served on certain parties to the action not interested in the appeal.—*Dore v. Dougherty*, 72 Cal. 232, 13 Pac. 621, 1 Am. St. Rep. 48.

An order of the trial court modifying a judgment in accordance with the directions of the supreme court made on a prior appeal, and the judgment as modified, are both appealable, and appeals taken therefrom will not be dismissed on the ground that they are frivolous.—*Randall v. Duff*, 104 Cal. 126, 37 Pac. 803, 43 Am. St. Rep. 79.

Brief containing language impugning motives of lower court will be ordered stricken out and if proper brief not filed the appeal will be dismissed.—*Sears v. Starbird*, 75 Cal. 91, 16 Pac. 531, 7 Am. St. Rep. 123.

Section 3589. Effect of Dismissal: The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

1887 R. S. Sec. 4823.

DISMISSAL OF APPEAL, EFFECT OF: A dismissal of an appeal for failure to file transcript is a bar to another appeal, unless such dismissal is made without prejudice to a second appeal.—

Fahey v. Belcher (Idaho), 32 Pac. 1135.

EFFECT OF DISMISSAL OF APPEAL: When without prejudice to another appeal.—*Coffin v. Edgington*, 2 Idaho, 595, 23 Pac. 80.

REVIEW AND JUDGMENT.

Section 3590. What may be Reviewed on Appeal from Judgment: Upon an appeal from a judgment, the court

may review the verdict or decision, and any intermediate order or decision, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken.

1887 R. S. Sec. 4824.

APPEAL, REVIEW: On appeal from the judgment only, where it does not appear that a motion for a new trial was made, or that any settlement was filed pursuant to Rev. St. Idaho, Section 4443, the judgment only can be considered.—*Washington & I. R. R. Co. v. Osborne*, 2 Idaho, 527, 21 Pac. 421.

NON-APPEALABLE ORDERS, BILL OF EXCEPTIONS: Interlocutory non-appealable orders in an action cannot be reviewed on appeal, without being incorporated into a bill of exceptions.—*Graham v. Linnehan*, 1 Idaho, 780.

REVIEW, DEMURRER TO COUNTER CLAIM: An order sustaining a demurrer to a counter claim set forth in an answer may be reviewed on an appeal taken from the final judgment in the action by the defendant.

In an action by the mortgagee to foreclose his mortgage, the mortgagor may, in his answer, set forth a counter claim for purchase money due him from the mortgagee on a bargain and sale of realty; and it is reversible error to sustain a demurrer to such counter claim on the ground that there is "no relation or connection between the subject matter set out in the plaintiff's complaint and the said counter claim."—*Miller v. Hunt* (Idaho), 57 Pac. 315.

REVIEWING VERDICT ON APPEAL FROM JUDGMENT, PRACTICE: Upon an appeal from the judgment the court may review the verdict of the jury, if excepted to, and the evidence upon which such verdict is based. An exception to the verdict, on the grounds that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, however, unless the appeal is taken within sixty days after the rendition of the judgment.—*Ainslie v. Idaho World Printing Co.* 1 Idaho, 641.

ERROR, WHAT CAN BE CONSIDERED: Without a bill of exceptions and settled statement, or an order of the court making such papers a part of the record to be sent to the appellate court, as a part of the transcript, the appellate court cannot consider errors

in the proceedings in the court below, except only such as are part of the record.—*People ex rel. Huston v. Hunt*, 1 Idaho, 433.

SAME, AFFIRMANCE OF JUDGMENT: And in such case if the pleadings warranted the verdict and judgment, this court cannot disturb the judgment; but must affirm the same.—*Hyde v. Harkness*, 1 Idaho, 638.

REVIEW ON JUDGMENT ROLL: On appeal from the final judgment, if the record contains no bill of exceptions or statement, the case must be reviewed and decided upon the judgment roll alone.—*Graham v. Linnehan*, 1 Idaho, 780; *Gamble v. Duniwell*, 1 Idaho, 268.

SAME, AFFIRMANCE: And if no error appears therein, the judgment will be affirmed.—*McCoy v. Oldham*, 1 Idaho, 465.

SAME, NO MOTION FOR NEW TRIAL: In cases where no motion for a new trial was made in the court below, or where there was no statement properly made on such motion, the appellate court will only examine the judgment roll, and if this be regular the judgment will be affirmed.—*Purdy v. Steel*, 1 Idaho, 216.

REVIEW OF EVIDENCE: Where no bill of exceptions or statement, agreed to and signed by the attorneys, or settled and signed by the judge, appears in the record, this court cannot review the evidence in an appeal taken from judgment.—*Jones v. Quayle* (Idaho), 32 Pac. 1124.

REVIEW OF REFEREE'S REPORT: If a party takes no exception to an order of court confirming the report of a referee, he is not in a condition to urge objections to such order in the appellate court.—*Taylor v. Peterson*, 1 Idaho, 513.

JUDGMENT ON PLEADINGS, REVIEW: Where an exception to an order of the court sustaining the motion for judgment on the pleadings is not incorporated into the records by bill of exceptions, an objection that the court erred in sustaining such motion will not be considered on appeal.—*Purdum v. Taylor*, 2 Idaho, 153, 9 Pac. 607.

Section 3591. Disposition, Law Determined: The court may reverse, affirm, or modify any order or judgment appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. Its judgment must be remitted to the court from which the appeal was taken. In giving a decision, if a new trial be granted, the court shall pass

upon, and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case.

1887 R. S. Sec. 3818, part of.

Judgment reversed, new action within one year, statute of limitations: Sec. 3147.

Errors and defects not affecting substantial rights, disregarded; judgment not reversed by reason thereof: Sec. 3243.

ERROR AGAINST RESPONDENT: On appeal the court will only notice the errors committed against the appellant, and not those committed against the appellee.—*Jones v. St. John Irrigating Co.* 2 Idaho, 58, 3 Pac. 1.

REGULARITY PRESUMED: An appellate court will not presume error in the court below and thus throw the onus on the respondent of establishing its correctness: "All intendments must be in favor of sustaining the judgments of courts of original jurisdiction, and to disturb such judgment, it is not sufficient that error may have intervened, but it must be affirmatively shown by the record."—*Goodman v. Minear Mining and Milling Company*, 1 Idaho, 131; *Toulouse v. Burkett*, 2 Idaho, 265, 13 Pac. 172; *Montandon v. Walker*, 2 Idaho, 152, 9 Pac. 608; *State v. Gibbs*, (Idaho), 38 Pac. 651; *Vermont Loan & Trust Co. v. McGregor* (Idaho), 51 Pac. 103.

Alleged errors not appearing affirmatively in the record will not be considered on appeal.—*State v. Haverly* (Idaho), 42 Pac. 506.

REVIEW, PRESUMPTION: Where the records show that a general demurrer was filed, but was silent as to any disposition of the same; the presumption will be indulged on appeal that the demurrer was overruled or abandoned.—*United States v. Alexander*, 2 Idaho, 354, 17 Pac. 746.

FILING OF REPORT OF REFEREE, PRESUMPTIONS: Where, on appeal from the judgment entered upon the report of referee, the record does not disclose the time of the filing of the report, it will be presumed that it was filed within the time prescribed by statute.—*Montandon v. Walker*, 2 Idaho, 152, 9 Pac. 608.

DEFECTIVE RECORD: Where in an action to foreclose a mortgage, the transcript on appeal does not show affirmatively that one of the defendants is a married woman, an objection that judgment could not be rendered against such defendant in that she is a married woman, will not be considered. The record must affirmatively show error.—*Murphy v. Fuld*, 2 Idaho, 161, 9 Pac. 609.

EVIDENCE TO SUPPORT OBJEC-

TION: Where the record shows no evidence in the court below upon the question of the insanity of the defendant, this court will not entertain or consider that question.—*State v. St. Clair* (Idaho), 53 Pac. 1.

LACHES NOT PRESUMED: Where the record fails to show the date of adjournment of the term of district court at which the order vacating judgment was made, laches will not be presumed.—*Baker v. Knott* (Idaho), 35 Pac. 172.

APPEAL, REVIEW, DEFECTIVE RECORD: Where the record on appeal does not contain the evidence adduced in the trial court, an objection that the finding of fact is not supported by the evidence, will not be sustained.—*Toulouse v. Burkett*, 2 Idaho, 170, 10 Pac. 26; *Riborado v. Quaon Pang Mining Co.* 2 Idaho, 131, 6 Pac. 125.

Unless the record contains the evidence, this court cannot determine whether the special verdict of a jury on the findings of fact by the court are supported by the evidence.—*Zion's Co-Operative Mercantile Inst. v. Armstrong* (Idaho), 56 Pac. 168.

OBJECTIONS NOT RAISED BELOW, OBJECTION TO PLEADINGS: If an action is tried upon the theory that the answer denies the allegation of the complaint, the objection that certain allegations in the complaint are admitted through defective denials, cannot be raised for the first time in the appellate court.—*Toulouse v. Burkett*, 2 Idaho, 265, 13 Pac. 172.

Demurrer cannot be interposed on appeal.—*Guthrie v. Fisher*, 2 Idaho, 101, 6 Pac. 111.

Objection to the admissibility of evidence cannot be made for the first time in the appellate court.—*Darby v. Heagerty*, 2 Idaho, 260, 13 Pac. 85.

An objection that an affidavit on motion for a new trial was void, in that it did not have a proper jurat, cannot be raised on appeal for the first time.—*Heilner v. Brown*, 2 Idaho, 242, 12 Pac. 903.

OBJECTIONS RAISED AND WAIVED: When a motion for nonsuit is made by defendant at the close of plaintiff's testimony because of its insufficiency, and overruled, if defendant then introduces his testimony, he waives his right to have the error in overruling the motion reviewed.—*Chamberlain v. Woodin*, 2 Idaho, 609, 23 Pac. 177.

CONFLICT OF TESTIMONY: The appellate court will not disturb a judgment, or verdict, or finding, or order

denying a new trial, or granting a new trial, where there is a substantial conflict of testimony, and no law appears to have been violated. The appellate court will not attempt to weigh the evidence and decide between conflicting statements; but it will always review the evidence if the point is made that the verdict or judgment is contrary to the evidence.—*Monarch G. & S. M. Co. v. McLaughlin et al.* 1 Idaho, 617; *Mootry v. Hawley*, 1 Idaho, 543.

CONFLICTING EVIDENCE: Verdict not disturbed when.—*Bonner v. Powell* (Idaho), 61 Pac. 138.

TESTIMONY CONSISTING OF DEPOSITIONS: If the testimony consists wholly of depositions, the rule is different, but not when a considerable portion is oral.—*Ainslie v. Idaho World Printing Co.* 1 Idaho, 641.

FINDINGS OF COURT, VERDICT, JURY: In cases heard by the court below without a jury, the decisions of the court on questions of fact takes the place of the verdict of the jury in jury trials, and will not be disturbed where there is a substantial conflict in the testimony, unless the decision is clearly against the weight of the testimony.—*Sabin v. Burke* (Idaho), 37 Pac. 352; *Commercial Bank of Moscow v. Lieualien* (Idaho), 46 Pac. 1020.

EVIDENCE: Evidence in this case examined and held that there is no substantial conflict in the same.—*Commercial Bank of Moscow v. Lieualien* (Idaho), 46 Pac. 1020.

PASSION OR PREJUDICES: A judgment will not be reversed when there is substantial conflict in testimony or unless it seems the result of passion or prejudice.—*Chamberlain v. Woodin*, 2 Idaho, 609, 23 Pac. 177.

CONFLICTING EVIDENCE IN JURY TRIAL: Where the sole question in a case is one of fact, and the evidence is substantially conflicting, the finding of the jury will not be disturbed on appeal.—*Sears v. Flodstrom* (Idaho), 49 Pac. 11; *Murphy v. Montandon* (Idaho), 39 Pac. 195; *Simpson v. Remington* (Idaho), 59 Pac. 360.

FINDINGS OF FACT, PRESUMPTION: In the absence of any showing to the contrary, it will be presumed that the trial court made all necessary findings of fact, or that such findings were waived.—*Bunnell & Eno Inv. Co. v. Curtis* (Idaho), 51 Pac. 767.

FINDINGS, AFFIRMANCE: Where the findings are responsive to all the material issues raised by the pleadings and are warranted by the testimony and they support the judgment and no error of law appearing, the judgment will be affirmed.—*Cooper v. Kellog*, 2 Idaho, 304, 13 Pac. 350; *McGuire v. Lamb*, 2 Idaho, 346, 17 Pac. 749; *Mc-*

Carty v. Boise City Canal Co. 2 Idaho, 225, 10 Pac. 623.

SAME, TESTIMONY NOT IN RECORD: When no testimony is reported in a statement from which this court can determine as to the propriety or impropriety of the findings of the court below, the presumption is that the testimony was, in every respect, sufficient to support the findings.—*Hazard v. Cole*, 1 Idaho, 276.

SAME, OBJECTION NOT MADE BELOW: When a court fails to find upon a question, that question cannot be considered for the first time in the appellate court, unless the finding is necessary to enable the court to render judgment.—*Gamble v. Dunwell*, 1 Idaho, 268.

REVERSAL, UNCERTAINTY OF FINDINGS: Where the findings of fact are not responsive to the material issues, and are so uncertain that they would not warrant a judgment thereon, the case should be reversed.—*Bowman v. Ayers*, 2 Idaho, 282, 13 Pac. 346.

EVIDENCE, INSUFFICIENCY OF, INSTRUCTIONS, PRESUMPTIONS: When written instructions are not given to the jury, this court will presume that the law of the case was correctly given, unless the contrary appears; but when there is a great preponderance in the weight of evidence against the verdict, the appellate court will presume that the jury misconceived either the evidence or the law, and will order a new trial.—*Monarch G. & S. M. Co. v. McLaughlin*, 1 Idaho, 617.

APPEAL, DEFECTIVE RECORD, PRESUMPTIONS: Where a refusal to give an instruction requested by a party is assigned as error, the supreme court will look into the entire charge to determine whether such refusal was not prejudicial; and where the records show that a charge was given, which is not brought here for consideration, it will be presumed that the trial court gave all the instructions necessary to assist the jury in arriving at a just and proper verdict. — *Hopkins v. Utah Northern Railway Co.* 2 Idaho, 277, 13 Pac. 343.

INSTRUCTION: Harmless error: When the allegations of the complaint are supported by the proofs, and the verdict and judgment are in accordance with both, the supreme court will not grant a new trial because an instruction was given, which, although correct as an abstract principle of law, was not applicable to the case.—*Stinson v. Rourke* (Idaho), 46 Pac. 445.

SAME, MISUSE OF CONJUNCTION: A mere misuse of the conjunctive "and" in the place of the disjunctive "or" in a charge which has clearly and repeatedly correctly stated the law, is harmless

error, which will not warrant reversal.—*O'Connor v. Langdon*, 2 Idaho, 803, 26 Pac. 659.

PRACTICE IN CIVIL CASES, ORAL STIPULATIONS: The court will not attempt to determine the nature or effect of oral stipulations of litigants or attorneys affecting the rights of parties or the conduct of the trial and it will not enforce such stipulations unless attorneys agree in open court as to what they are, nor will they be considered on appeal unless they are made a part of the record.—*Sebree v. Smith*, 2 Idaho, 329, 16 Pac. 915.

A judgment will be modified and affirmed pursuant to a stipulation by the parties for a correction of errors assigned to certain portions thereof.—*Kelly v. Leachman* (Idaho), 39 Pac. 1113.

STIPULATION, REVERSAL ON BRIEF: A stipulation having been entered into in writing by and between the attorneys for the respective parties in this suit to the following effect, namely: "That the brief and all motions of the respondent's counsel be and are hereby withdrawn and respondent's counsel consents and agree that the appeal herein is well taken. That the findings in behalf of the plaintiff are true and correct, and that the findings in behalf of the defendant are untrue and incorrect, so far as the latter are inconsistent with the former. That the said cause be reversed, and remanded to the district court, of the first judicial district." The court does not deem it necessary to enter into any examination of the merits of the cause whatever, and has not done so. In accordance with said stipulation, the cause is reversed and remanded to the court below for such further proceedings as may be thought proper in the present condition of the same.—*Lockey v. Wallace* (Idaho), 34 Pac. 957.

RECORD: When the paper containing the stipulation between the parties to an action is, without objection, made a part of the transcript and both parties refer to it in their arguments in appeal, such paper would be considered a part of the records by consent of the parties.—*Grete v. Knott*, 2 Idaho, 18, 3 Pac. 25.

A stipulation of parties in disregard of the rules of the court will not be regarded by the court.—*First Nat. Bank of Moscow v. Martin* (Idaho), 55 Pac. 302.

Plaintiff brought action upon a usurious contract. Judgment was entered upon stipulation of parties in favor of plaintiff, from which defendant appealed. Held, that the judgment so entered being in contravention of the usury laws of the state, the same was

erroneous.—*Ocobock v. Nixon* (Idaho), 57 Pac. 309.

The costs of an appeal will be awarded to the appellant, where stipulations for the corrections of errors upon which the judgment appealed from is modified were made after the appeal was taken.—*Kelly v. Leachman* (Idaho), 39 Pac. 1113.

A judgment will not be reversed for harmless error.—*Barnes v. Pitts Agricultural Works* (Idaho), 55 Pac. 237.

HARMLESS ERROR: An offer of oral proof being made and rejected, and exception duly taken, the appellate court must be satisfied from the record that the offered evidence was material, or tendered to support some issue involved before it will be treated as error.—*United States v. Alexander*, 2 Idaho, 354, 17 Pac. 746.

On appeal a judgment in favor of the defendant will not be disturbed where the complaint fails to state a cause of action.—*Ollis v. Orr* (Idaho), 56 Pac. 162.

REVIEW, REFUSAL OF NEW TRIAL: An order granting a new trial will not be reversed on appeal unless it is made to appear that there has been a manifest abuse of discretion in granting a new trial.—*Brossard v. Morgan* (Idaho), 56 Pac. 163.

INJUNCTION, PRELIMINARY, GRANTING, REVIEW: The granting of a preliminary injunction resting in the sound discretion of the court, the appellate court will not disturb the same, where there is no abuse of discretion.—*Washington & I. R. Co. v. Coeur d'Alene Ry. Co.* 2 Idaho, 405, 17 Pac. 142.

APPEAL: When the appeal to this court brings up the whole record, and it is apparent therefrom that an erroneous judgment has been rendered by the court below, such judgment will be reversed.—*Hampton v. Board of Commissioners of Logan Co.* (Idaho), 43 Pac. 324.

MODIFICATION AND AFFIRMANCE: In cases on appeal where there is no issue of fact, this court will order the judgment of the court below corrected, if erroneous, in some particular matter only. It is not necessary to accomplish this purpose that the judgment should be reversed.—*Betts v. Butler*, 1 Idaho, 185.

MAY SET ASIDE JUDGMENT OF DISMISSAL AND ENJOIN DEFENDANTS PENDING FURTHER PROCEEDINGS IN DISTRICT COURT. Under Rev. St. 1887, Section 3818, providing that the supreme court "may reverse, affirm or modify any order or judgment appealed from and may direct the proper judgment to be entered," etc. The supreme court can set aside a judgment of dismissal, in order to give

plaintiff an opportunity to amend, and direct the court below to issue a temporary injunction restraining defendants from interfering with plaintiffs' rights. On re-hearing, modified. For former opinion see 39 Pac. (Id.) 562.—*Boise City v. Artesian Hot & Cold Water Co.* (Idaho), 39 Pac. 564.

REMANDING CASE: When the appellate court is in possession of all the rights of the parties, and can render full and complete justice, it will not remand the case for further litigation.—*Gorman v. Commissioners of Boise County*, 1 Idaho, 655.

When all the facts necessary to its final determination are before the appellate court, final judgment may be given therein and it is not necessary to send the case back for a new trial.—*Ollis v. Kirkpatrick*, 2 Idaho, 976, 28 Pac. 435.

ENFORCEMENT OF DECISION AND ORDERS: This court at a prior term (32 Pac. 200) decided the appellants entitled to the possession of certain mining claims, and ordered that they be put into possession of them. The court below thereupon issued a writ of restitution. The sheriff made return to the writ, "that he found parties in possession of the premises that were not parties to the suit, and who were claiming the premises by location under the laws of the United States." The sheriff was cited to show cause why he did not execute the writ of restitution, to which he made answer that the plaintiffs refused to indemnify him, he having made demand therefor. Held, that the sheriff was not entitled to indemnity.—*Ah Kle v. Gregory* (Idaho), 34 Pac. 812.

APPEAL, REVIEW, EFFECT: A suit was brought under act Idaho January 30, 1885, to contest the election of a sheriff who had received a certificate of election from the canvassing board of the county. On appeal to the supreme court, the act was declared unconstitutional and the judgment reversed. Held, the effect of such reversal was to declare the suit a nullity and it should have been dismissed by the court below.—*In re Havird*, 2 Idaho, 652, 24 Pac. 542.

REHEARING, WHEN: A petition for rehearing will not lie in case of preliminary or interlocutory orders made by the supreme court. It is only in case of a final decision that petitions for rehearing will be considered.—*Prout v. Mounce* (Idaho), 57 Pac. 307.

APPEAL, REHEARING: When a case has been submitted for final determination, and the appeal is dismissed and judgment of the lower court is affirmed, a hearing will not be granted on an application to vacate and set

aside the order dismissing the appeal.—*Adams v. McPherson* (Idaho), 35 Pac. 690.

SAME, MODIFICATION OF JUDGMENT: The opinion on rehearing modified the judgment of the trial court, and directed that the receiver first pay the judgment of John Burke upon the note of \$24,350 together with interests and costs, etc. Upon a further consideration of this matter we find that no interest should have been allowed on said judgment, for the reason that money belonging to the estate of Barnet sufficient in amount to pay said judgment was in the hands of said respondent Burke from the time of the rendition of said judgment. Said decision is so modified as not to allow interest upon the amount of the judgment on said \$24,350 note. And it is further ordered that the judgment of this court with reference to costs be modified as follows. The appellants shall pay two-thirds and the respondents one-third of the costs, both on appeal and in the court below.—*Sabine v. Burke* (Idaho), 38 Pac. 246.

LAW OF THE CASE: The decision of the supreme court, from the time it is declared, becomes the law of that case and of that question, and must remain the law of the territory until overruled by said court, or reversed by some proper appellate tribunal, or until it is superseded by proper legislation.—*Crutcher v. Sterling*, 1 Idaho, 306.

LAW OF THE CASE: A decision of the supreme court in a given case, even although it be erroneous, becomes the law of the case, upon the points involved, and cannot be reviewed later or changed upon a subsequent hearing in this court. (Questioning the correctness of the judgment in *People v. Lindsay*, 1 Idaho, 39.)—*Lindsay v. People*, 1 Idaho, 438.

RES JUDICATA, EFFECT: The position of the appellate court upon any matter properly before it on the record becomes the law of the case in all subsequent proceedings therein.—*Palmer v. Utah Northern Railway Co.* 2 Idaho, 350, 16 Pac. 553.

APPEAL, REVIEW, SPECIAL FINDINGS, STATEMENT OF FACTS: In an action on a policy of life insurance, which was submitted upon an agreed statement of evidential facts from which ultimate facts were to be found, the trial court determined that a notice of assessment was insufficient, under the state laws, but made no special finding as to when the notice was served, what it contained, or to which of the several classes of insurance companies provided for by the state laws the defendant belonged. Held, that since the statement of facts

amounted to a mere report of the evidence, which could not, on proceedings in error, be examined in order to determine the law applicable thereto, the record, in the absence of a special finding of facts, presented no question for the determination of the appellate court.—(*Raimond v. Terrebonne Parish*, 10 Sup. Ct. 57, 132 U. S. 192, followed.)

SAME, ASSIGNMENT OF ERROR, OPINION OF COURT: Since the opinion of the trial court is no part of the record, assignments of error directed to such opinion will not be considered on review. (In error to Circuit Ct. U. S. Dist. Idaho.)—(*Mutual Reserve Fund Life Ass'n v. DuBois*, 85 Fed. Rep. 586.)

JUDGMENT RES JUDICATA, CONFLICTING MINING CLAIMS: The Tyler M. Co. applied for a patent to the Tyler mining claim. The Last Chance Min. Co. protested against such application, and brought suit to determine the right of possession to so much of the surface ground as was included in the conflicting locations of the Tyler and Last Chance claims, as shown upon the diagram in the opinion of the court. The Tyler M. Co. after appearing and making a defense to said suit, withdrew its answer in open court, and judgment was entered for the Last Chance M. Co. reciting the priority of its claim. Subsequently the Tyler M. Co. left out from its original location a certain portion thereof, including the portion described in the judgment, and thereafter brought an ejectment suit against the Last Chance M. Co. for the ground not embraced in said judgment. Held, that the judgment in the prior suit was not *res judicata* as to the priority of the Last Chance location and that it was conclusive only as to the right of possession to the triangular piece of ground involved in that suit. (In error to Circuit Ct. U. S. for Dist. Idaho.)—(*Tyler Min. Co. v. Sweeny*, 54 Fed. Rep. 284.)

APPEAL AND ERROR, SECOND WRIT OF ERROR, PRIOR DECISION: Where a case has been brought before an appellate court, and there decided, a second writ of error brings up nothing for review but the proceedings subsequent to the mandate; and the appellate court is not bound to consider any of the question which were before it on the first writ of error. (In error to Circuit Ct. U. S. for Dist. Idaho.)—(*Republican Min. Co. v. Tyler Min. Co.* 79 Fed. Rep. 733.)

FEDERAL COURTS, FOLLOWING STATE DECISIONS, CONSTRUCTION OF STATUTE: Where a suit involves rights under a contract affected by a state statute, and entered into before such statute has been construed by the state courts, a federal court is not

bound by a subsequent construction by the state courts, but will exercise an independent judgment.—(*Vermont Loan & Trust Co. v. Dygert*, 89 Fed. Rep. 123.)

PRESUMPTIONS IN FAVOR OF JUDGMENT: Error will not be presumed by the appellate court; it must be clearly and affirmatively disclosed by the record.—(*Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318.)

This presumption applied to ruling of lower court in refusing to retax costs.—(*Mitchell v. Bromberger*, 2 Nev. 345, 90 Am. Dec. 550. And to review of order sustaining demurrer on ground that the action is barred by the statute of limitations, when transcript is silent as to time when action was commenced.—(*Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384.)

And where there are no findings of fact in the case it must be presumed on appeal that all of the issues of fact raised by the party were found in favor of the party recovering judgment. (*Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90. And every material fact not found by the court below must be presumed in favor of the judgment.—(*Jones v. Adams*, 19 Nev. 78, 6 Pac. 442, 3 Am. St. Rep. 88.)

SPECIFICATION OF ERRORS: Only such errors as the appellant complains of can be considered on appeal.—(*Dennis v. Caughlin*, 22 Nev. 447, 41 Pac. 768, 58 Am. St. Rep. 761.)

The supreme court will not regard any alleged error which is not clearly assigned in the transcript. The statement on appeal or on motion for a new trial should distinctly set forth the grounds upon which the party relies for reversal.—(*Wixon v. B. R. & A. W. & M. Co.* 24 Cal. 367, 85 Am. Dec. 69.)

A general objection that each and every ruling of the trial court was erroneous is not sufficient.—(*Whyte v. Rosencrantz*, 123 Cal. 634, 56 Pac. 436, 69 Am. St. Rep. 90.)

Error in granting non-suit is error of law and if expected to may be reviewed without any specification of particulars wherein evidence is insufficient.—(*Hammond v. Wallace*, 85 Cal. 522, 24 Pac. 837, 20 Am. St. Rep. 239.)

Sufficiency of complaint may be considered on motion for a new trial if the defendant moved for a non-suit in the trial court on the ground that the contract set out in the complaint was against public policy, and the motion was denied. Error of court in denying non-suit, if excepted to, may be reviewed on a bill of exceptions.—(*Alpers v. Hunt*, 86 Cal. 78, 24 Pac. 846, 21 Am. St. Rep. 17.)

DISMISSING ACTION, WANT OF PROSECUTION: An order of court dismissing an action for want of prosecu-

tion will not be reversed by the supreme court unless there has been an abuse of discretion; and it is incumbent on the appellant to establish affirmatively that there has been much abuse of discretion.—*Grigsby v. Napa County*, 36 Cal. 585, 95 Am. Dec. 213.

APPEAL, REFUSAL OF LEAVE TO AMEND: The matter of granting or refusing leave to amend a pleading is very largely in the discretion of the trial court, and its action in refusing such an application is not reviewable on appeal where no abuse of discretion is shown.—*Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58.

Objection to non-joinder of parties must be taken advantage of by demurrer, and comes too late on appeal from the final judgment.—*Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125.

REVIEW OF ORDER OVERRULING DEMURRER: Error in overruling a demurrer to an answer will not be reviewed on appeal when a replication has been filed after the demurrer has been overruled, and the answer is defective and uncertain in form of averment, or in such matters as can be cured by verdict. Otherwise when the answer fails to state facts sufficient to constitute a cause of action.—*Raymond v. Wimsette*, 12 Mont. 551, 31 Pac. 537, 33 Am. St. Rep. 604.

Error of court in striking out part of an answer can not be adjudged harmless because, on the trial of the cause, the evidence received by the court showed that the material allegations thus stricken from the pleadings were false.—*De Baker v. Southern Cal. Ry. Co.* 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237.

Where there is not an entire absence in pleading of allegations constituting a cause of action or defense, and no demurrer is filed, or objection made in the court below, the judgment will not be disturbed.—*Lee v. Figg*, 37 Cal. 328, 99 Am. Dec. 271.

On appeal from order denying a new trial, the judgment cannot be reversed on the ground of a defective complaint, or that the judgment is not warranted by the findings.—*Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134. But where the findings are duly excepted to, if they do not cover all issuable facts it is cause for reversal.—*Kahn v. Central Co.* 2 Utah, 383.

A complaint can not be amended in the supreme court so as to make it correspond with the verdict.—*Hooper v. Wells*, 27 Cal. 11, 85 Am. Dec. 211.

The appellate court can not review the evidence in the transcript on appeal, for the purpose of finding the facts and ordering judgment to be en-

tered accordingly.—*Barden v. Montana Club*, 10 Mont. 330, 25 Pac. 1042, 24 Am. St. Rep. 27.

An appellate court will not supply a finding to support a judgment upon a point respecting which the evidence was conflicting.—*Smith v. Immigration, Etc. Ass'n*, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53.

Finding of court below will not be disturbed by supreme court, where there is a substantial conflict in the evidence, although the supreme court may be of the opinion that there is a preponderance of evidence against the finding.—*Lick v. Madden*, 36 Cal. 208, 95 Am. Dec. 175.

APPEAL, REVIEWING EVIDENCE: A statute declaring where the evidence taken altogether does not support the verdict, decision or judgment, the appellate court should grant a new trial, imposes on the court the duty of reviewing the evidence, and determining whether an assailed finding is supported by it. If there is substantial conflict in the testimony, the verdict of the jury or the findings of the trial court should not be disturbed; but on the other hand, the appellate court should interpose when, upon all the evidence, it is clear that a wrong conclusion has been reached.—*Watt v. Nevada Central R. R. Co.* 23 Nev. 154, 44 Pac. 423 and 46 Pac. 52 and 726, 62 Am. St. Rep. 772.

In cases at law the verdict of the jury is conclusive if there is any evidence to support it.—*Beardsley v. Morrison*, 18 Utah, 478, 72 Am. St. Rep. 795, 56 Pac. 303.

EQUITY CASES, REVIEW OF FINDINGS: An appeal may be taken, in equity cases, on questions of fact as well as of law, and the appellate court may go behind the findings; weigh the evidence, and decide according to its preponderance; but the findings of the court below will not be disturbed when the evidence to a fact is so evenly balanced, or the proof of it is so unsatisfactory, as to cause the mind to hesitate and pause as to the side on which it preponderates, and to leave it in grave doubt.—*North Point Irr. Co. v. Utah, Etc. Canal Co.* 16 Utah, 246, 52 Pac. 168, 67 Am. St. Rep. 607.

Appellate court will set aside order granting new trial as unauthorized, when the verdict and judgment are in accordance with the evidence, and there is no substantial conflict upon any material issue, and no error has intervened.—*Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540.

If the findings of fact are defective, the presumption is that proof was made at the trial in relation to the defective matter, and the judgment will not be

reversed unless the findings are excepted to.—*Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134.

..CONFLICTING INSTRUCTIONS GROUND FOR REVERSAL: Where defendant in ejectment claims under a deed alleged to be forged, and pleads the statute of limitations, conflicting instructions as to the time when the statute began to run are grounds for reversal.—*Haight v. Vallet*, 89 Cal. 245, 26 Pac. 897, 23 Am. St. Rep. 465.

A party to an action is bound by rulings of the court which he obtains upon his own motion, and is estopped from claiming such ruling error.—*Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333, 18 Am. St. Rep. 738.

Harmless error.—See note 11 Am. St. Rep. 287-288.

Erroneous exclusion or admission of evidence, if not prejudicial, is not ground for reversal.—*Kisling v. Shaw*, 33 Cal. 425, 91 Am. St. Rep. 644. As, if it could not change result.—*Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519. Nor to receive, against objection, answer of witness which calls for conclusion, where case is being tried without jury and where evidence regardless of such answer is sufficient to establish the facts upon which such conclusion is based.—*Maynard v. Locomotive Engineers', Etc. Ass'n*, 16 Utah, 145, 51 Pac. 259, 67 Am. St. Rep. 602.

MODIFYING JUDGMENT: If, in an action to recover damages the trial court enters judgment for a greater sum than warranted by the complaint, but the findings necessarily show such allegations are true, the judgment may be modified in the appellate court by striking off the excess and affirming as to the residue.—*Kerry v. Pacific Marine Co.* 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65.

INSUFFICIENT FINDINGS: If a judgment is reversed upon findings which were against the plaintiff and appellant, there must be a new trial, as a judgment for him, by the appellate court, would be unsupported by the findings of fact, and that court has no power to make them.—*Kellogg v. King*, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74.

If a decree for maintenance contains no provision for its modification or change, the court will, upon an appeal from the judgment, be required to modify it by providing therein that, upon

application of either party, upon notice to the other, and upon the proper showing therefor, it may modify or change the judgment in such mode and to such extent as it may deem just, or may set the judgment aside.—*Anderson v. Anderson*, 124 Cal. 48, 56 Pac. 630 and 57 Pac. 81, 71 Am. St. Rep. 17.

Where in an action for negligently causing death, it appears that excessive damages have been assessed by the verdict and judgment, the same may be modified on appeal by reducing the amount and directing the lower court to enter judgment accordingly.—*English v. Southern Pacific Co.* 13 Utah, 407, 45 Pac. 47, 57 Am. St. Rep. 772.

The costs of appeal may be deducted from costs awarded to respondent in the court below where judgment is affirmed in part and reversed in part.—*Cloe v. Swanston*, 1 Cal. 51, 54 Am. Dec. 288.

A new trial may be granted where the facts are not investigated in the trial court by reason of the uncertainty of novel provisions of the practice act.—*Speyer v. Ihmels & Co.* 21 Cal. 281, 81 Am. Dec. 157.

The general language of the opinion of a case must be construed with reference to the particular facts then before the court.—*Chapman v. State*, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158.

Contract entered into under belief of parties that law of the subject matter was established by a decision of the supreme court, will not be set aside in equity because of a subsequent decision of the same court overruling the former one, and declaring a different rule upon the subject.—*Kenyon v. Welty*, 20 Cal. 637, 81 Am. Dec. 137.

Decision of supreme court on former appeals to certain questions involved becomes the law of the case, and will be followed on a second appeal.—*Johnston v. San Francisco Savings Union*, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129; *More v. Calkings*, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128.

Stare decisis: See note 73 Am. St. Rep. 98.

Judgments against trustees, conclusiveness against beneficiaries: See note 73 Am. St. Rep. 165. *

Affirmance of void judgment imparts no validity to the judgment but is itself void.—*Pioneer Land Co. v. Maddux*, 109 Cal. 633, 42 Pac. 295.

Section 3592. Remedial Powers of Appellate Court:

When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as the restitution is consistent with the protection of a purchaser of property at a sale or-

dered by the judgment, or had under process, issued upon the judgment on the appeal from which the proceedings were not stayed; and for relief in such cases, the appellant may have his action against the respondent enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale. When it appears to the appellate court that the appeal was made for delay, it may add to the cost such damages as may be just.

1887 R. S. Sec. 4825.

Affidavits cannot be read in support of a motion for damages for failure to prosecute an appeal.—*Cady v. Scaniker*, 1, Idaho, 168.

There is no question of the right of this court to allow damages in cases when appeals have been taken merely for delay, and no transcript ever called for.—*Cady v. Scankier*, 1 Idaho, 168.

Where no transcript was ever ordered nor steps taken to bring up the case by appellant, it will be docketed and dismissed, with 12 per cent. damages for delay, under Rev. St. Section 4825.—*Day v. Gridley* (Idaho), 56 Pac. 77.

On an appeal from an order denying a new trial, a previous order of the trial court granting a new trial, and its subsequent order vacating and setting aside that order and reinstating the motion for a new trial, which are not embodied in any bill of exceptions, but which are filed as an "additional record" upon the suggestion of a diminution of the record, do not properly form part of the record on appeal from the order denying the new trial, and will not be considered.—*Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138.

RESTITUTION AFTER MODIFICATION: If a judgment is modified on appeal by reducing the amount of the recovery, the appellant is not entitled to have a sale made of the property to a party to the action, for an amount less than the judgment as modified, vacated, though the statute declares that when a judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order.—*Hewitt v. Dean*, 91 Cal. 617, 28 Pac. 93, 25 Am. St. Rep. 227.

SALE UNDER REVERSED JUDGMENT: If, in a suit to foreclose one mortgage in which the mortgagors and the holder of the other mortgage are made parties defendant, a decree of foreclosure is entered from which the mortgagee defendant appeals, and obtains a reversal on the ground that the court erred in determining the properties of the respective mortgages,

to which appeal the mortgagors, however, were not parties, the judgment of reversal does not affect the sale of the mortgaged premises made to the plaintiff before such reversal, the execution of the judgment not having been stayed pending the appeal; and the plaintiff, having obtained a sheriff's deed pursuant to the sale, holds title paramount to that of the other mortgagee.—*Withers v. Jacks*, 79 Cal. 297, 21 Pac. 824, 12 Am. St. Rep. 143.

RESTITUTION OF POSSESSION OF LAND UNDER REVERSED JUDGMENT: Where a party has been wrongfully dispossessed of land by order of a superior court, which upon appeal is reversed, and restitution of possession directed, such restitution cannot be prevented by a third person, who has gained peaceable possession under title derived from an independent source, and adverse to both parties to the suit, and who is not in collusion with either.—*Quan Wo Chung Co. v. Laumeister*, 83 Cal. 384, 23 Pac. 320, 17 Am. St. Rep. 261.

Provision of statute authorizing supreme court on reversal of judgment to make restitution of all property and rights lost by the erroneous judgment, does not exclude the court below from exercising the same power. A party aggrieved by an erroneous judgment may proceed by motion to be restored to the rights lost thereby, and is not compelled to proceed by action in the usual form. A judgment of a court having jurisdiction is valid and binding until reversed or set aside. A party against whom an erroneous judgment has been reversed must, on the reversal thereof, be restored to all things that he has lost by such judgment. But a bona fide purchaser at a judicial sale made under execution issued upon such a judgment, is not within this rule, but is protected.—*Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459.

The effect of the reversal of a judgment is to leave the parties where they stood before its rendition.—*Ward v. Marshall*, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198.

Section 3593. Remittitur must be Certified to Clerk of Court Below: When the judgment is rendered upon

the appeal, it must be certified by the clerk of the supreme court to the clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment roll, and enter a minute of the judgment of the supreme court on the docket, against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified by the supreme court on appeal.

1887 R. S. Sec. 4826.

Costs on appeal are awarded of course to prevailing party, except when new trial ordered or judgment modified, when they are in discretion of court: Sec. 3725.

EFFECT OF REMITTITUR: The general rule seems to be well settled that this court loses jurisdiction of a case, when the remittitur has been sent to and filed in the court below. This general rule rests, however, on the supposition that all the proceedings have been regular; that no fraud or imposition has been practiced upon the court or opposite party; for if such appears to have been the case, the appellate court will assert its jurisdiction and re-

call the case.—*Hazard v. Cole*, 1 Idaho, 276.

Where judgment is reversed, and cause remanded for further proceedings according to the views expressed in the opinion in relation to a particular finding not sustained by the evidence, the trial court need not proceed to try the entire case anew, but may confine the testimony to the issue erroneously decided, and in other respects pass upon the issues in the light of the evidence already before it, or adopt the facts already found upon such testimony.—*Chandler v. People's Savings Bank*, 73 Cal. 317, 11 Pac. 791 and 14 Pac. 864, 2 Am. St. Rep. 812.

TITLE XVII.

CIVIL PROCEEDINGS IN PROBATE AND JUSTICES' COURTS.

- Chap. CLII. Proceedings in Civil Actions in Probate Courts.
- Chap. CLIII. Place of Trial in Justices' Courts.
- Chap. CLIV. Manner of Commencing Actions in Justices' Courts.
- Chap. CLV. Pleadings in Justices' Courts.
- Chap. CLVI. Provisional Remedies in Justices' Courts.
- Chap. CLVII. Trials in Justices' Courts.
- Chap. CLVIII. Judgment.
- Chap. CLIX. Executions from Probate and Justices' Courts.
- Chap. CLX. Contempts in Justices' Courts.
- Chap. CLXI. Dockets of Probate Court and Justices of the Peace.
- Chap. CLXII. Appeals from Probate and Justices' Courts to District Court.
- Chap. CLXIII. General Provisions Relating to Probate and Justices' Courts.

CHAPTER CLII.

PROCEEDINGS IN CIVIL ACTIONS IN PROBATE COURTS.

Section.

3594. Practice and proceedings, rules applicable.

Section 3594. Practice and Proceedings, Rules Applicable: The process, provisional remedies, supplementary proceedings, and the rules of practice and pleading in the probate court, when the debt or sum claimed does not exceed three hundred dollars, shall be the same as in justices' courts; in all other cases within its civil jurisdiction, the same as in the district courts, except when other provision is made by this Code.

1887 R. S. Sec. 4629.

Probate court appeals to supreme court from actions arising in, within what time: Sec. 3573.

Where the words "probate court" or "probate judge," etc appear in this title (Chaps. CLIII to CLXIII, Secs. 3595 to 3697) they must be understood as referring to civil proceedings in probate court and in no manner affecting probate proceedings. The said chapters in the Revised Statutes were embodied under the general title "Proceedings in Justice's Courts."

Proceedings entitled to verity of a court of record only in probate matters: Sec. 3004.

Probate courts, civil provisions on, are indexed under justice's courts: See generally.

Place of trial: Chap. CLIII, Secs. 3595 to 3601.

Commencing actions: Chap. CLIV, Secs. 3602 to 3612.

Pleadings: Chap. CLV, Secs. 3613 to 3622.

Provisional remedies: Chap. CLVI, Secs. 3623 to 3633.

Trials: Chap. CLVII, Secs. 3634 to 3648.

Judgments: Chap. CLVIII, Secs. 3649 to 3663.

In the exercises of its powers in civil

actions, the probate court is of limited and peculiar jurisdiction, and only such provisions of the Code as are in their nature applicable or expressly made so, apply: Sec. 3696.

As to the verity of its record, etc., which is probably inapplicable to its proceedings outside of its probate jurisdiction: Sec. 3004.

A court of record: Sec. 2982.

PROBATE JUDGE, DUTIES: A probate judge is by law invested with the powers of a justice of the peace, and while he is in discharge of the duties appertaining to such, he is not acting as probate judge of the country for which he was chosen, but he is a justice of the peace in the same character and performing the same duties as any other justice of the peace.—*People v. Du Rell*, 1 Idaho, 44.

PLEADING, DEMURRER: A demurrer is a proper pleading in the probate court.—*Leggett v. Meyers*, 1 Idaho, 548.

PLEADING, ANSWER: When a defendant in an action demurs within ten days after the service of summons upon him, he has answered within the meaning of the state, and no judgment for want of an answer can be rendered against him.—*Leggett v. Meyers*, 1 Idaho, 548.

CHAPTER CLIII.

PLACE OF TRIAL IN JUSTICES' COURTS.

Section.

3595. Action, where may be commenced.

3596. Change of place of trial in certain cases.

3597. Limitation on the right to change.

3598. To what court transferred.

Section.

3599. Proceedings after order changing place of trial.

3600. Effect of order changing place of trial.

3601. Transfer of cases to the district court.

Section 3595. Action, where may be Commenced: Action in justices' courts must be commenced, and subject to the

right to change the place of trial (as in this Chapter provided), must be tried:

1. If there is no justices' court for the precinct or city in which the defendant resides, in any city or precinct of the county in which he resides;

2. When two or more persons are jointly, or jointly and severally bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different precincts or different cities of the same county, or in different counties, in the precinct or city in which any of the persons liable may reside;

3. In cases of injury to the person or property; in the precinct or city where the injury was committed, or where the defendant resides;

4. If for the recovery of personal property, or the value thereof, or damages for taking or detaining the same; in the precinct or city in which the property may be found, or in which the property was taken, or in which the defendant resides;

5. When the defendant is a non-resident of the county; in any precinct or city wherein he may be found;

6. When the defendant is a non-resident of the State in any precinct or city in the State;

7. When a person has contracted to perform an obligation at a particular place and resides in another county, precinct or city; in the precinct or city in which such obligation is to be performed or in which he resides;

8. When the parties voluntarily appear and plead without summons; in any precinct or city in the State;

9. In all other cases; in the precinct or city in which the defendant resides.

1887 R. S. Sec. 4639.

Jurisdiction and powers generally: Secs. 3007-3010.

Jurisdiction in forcible entry and detainer proceedings: Sec. 3980.

Place of trial, wrong, does not invalidate judgment but ground for reversal, on appeal if objections taken, otherwise waived: Sec. 3652.

Under the provisions of Section 2653 and 4639, Rev. St., the justice court in the precinct or city where the injury occurred had jurisdiction to try the action, and the plaintiff could elect between the two named justice.—Webster

v. Oregon Short Line R. R. Co. (Idaho), 55 Pac. 661.

Under the provisions of Section 4639, Rev. St., a foreign corporation doing business in this state may be sued in a justice court, in the precinct in which an injury to property occurs, to recover damages for such injury, although such precinct may be in a county other than the one in which its principal place of business is, and is duly designated agent to receive process for it resides.—Webster v. Oregon Short Line R. R. Co. (Idaho), 55 Pac. 661.

Section 3496. Change of Place of Trial in Certain Cases: The court may at any time before the trial, on motion, change the place of trial in the following cases:

1. When it appears to the satisfaction of the justice before whom the action is pending, by affidavit of either party, that such justice is a material witness for either party;

2. When either party makes and files an affidavit that he believes

that he cannot have a fair and impartial trial before such justice by reason of the interest, prejudice or bias of the justice;

3. When, from any cause, the justice is disqualified from acting.

1887 R. S. Sec. 4640.

Sub. 2. It would seem that upon the filing of the affidavit, as required by the statute, it would be the duty of the jus-

tice not to try the case, but to transfer it.—Flagley v. Hubbard, 22 Cal. 38; People v. Compton, 123 Cal. 413, 56 Pac. 44.

Section 3597. Limitation on the Right to Change:

The place of trial cannot be changed in justice's court on motion of the same party, more than once, upon any or all of the grounds specified in the first and second subdivisions of the preceding Section.

1887 R. S. Sec. 4641.

Section 3598. To What Court Transferred:

When the court orders the place of trial to be changed, the action must be transferred for trial to a court the parties agree upon; and if they do not agree, then to the probate court or to another justice's court in the same county.

187 R. S. Sec. 4642.

Change of venue must be to another justice's court in the same county: Secs. 3185-3186.

Section 3599. Proceedings After Order Changing

Place of Trial: After an order has been made transferring the action for trial to another court, the following proceedings must be had:

1. The justice ordering the transfer must immediately transmit to the clerk of the probate court, or to the justice to whom it is transferred, on payment of his costs by the party applying, all the papers in the action, together with a certified transcript from his docket of the proceedings therein;

2. Upon the receipt by him of such papers, the clerk or justice must issue a notice stating when and where the trial will take place, which must be served upon the parties at least one day before the time fixed for trial.

1887 R. S. Sec. 4643.

Section 3600. Effect of Order Changing Place of

Trial: From the time the order changing the place of trial is made, the court to which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court.

1887 R. S. Sec. 4644.

Section 3601. Transfer of Cases to the District

Court: The parties to an action in a probate or justice's court cannot give evidence upon any question which involves the title or possession of real property, nor can any issue presenting such question be tried by such court; and if it appear from the answer of the defendant, verified by his oath, or that of his agent or attorney, that the determination of the action will necessarily involve the question of title or possession to real property, the probate court or justice must suspend all further proceedings in the action and certify the pleadings, and, if any of the pleadings are oral, a transcript of

the same, from his docket to the clerk of the district court of the county and from the time of filing such pleadings or transcript with the clerk, the district court has over the action the same jurisdiction as if it had been commenced therein; *Provided*, That this Section shall not be construed to extend to or include actions of forcible entry, forcible detainer or unlawful detainer.

1887 R. S. Sec. 4645.

Limitations, actions concerning real property: Sec. 3009.

Justices courts have no jurisdiction where the boundaries or title to real property shall be called in question.—Const. Art. V, Sec. 22.

Justice of the peace, under a statute giving jurisdiction over injuries to person only, have no jurisdiction to try cause for damage from diversion of

water from a natural or artificial channel.—*Hill v. Newman*, 5 Cal. 445, 63 Am. Dec. 445.

Upon a transfer of a cause where the title to real estate comes in dispute, the district court may allow an amendment to the complaint to the same extent as though the case had been commenced in such court.—*Baker v. Southern Cal. Ry. Co.* 114 Cal. 501, 46 Pac. 604.

CHAPTER CLIV

MANNER OF COMMENCING ACTIONS IN JUSTICES' COURT.

Section.

3602. Actions, how commenced.

3603. Summons may issue within one year.

3604. Defendant may waive summons.

3605. Parties may appear in person or by attorney.

3606. Appearance of infant, insane or incompetent person.

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3607. Summons, requirements of.

3608. Time of appearance of defendant.

3609. Alias summons.

3610. Summons, limitation on service of.

3611. By whom and how served.

3612. Hour for appearance.

Section 3602. Actions, how Commenced: An action in a justice's court is commenced by filing a complaint.

1887 R. S. Sec. 4650.

Complaint generally: Sec. 3204.

Limitations, commencement of ac-

tions: Secs. 3115 et seq.

Actions, when deemed pending: Sec. 3742.

Section 3603. Summons may Issue within one Year: The court must indorse on the complaint the date upon which it was filed, and at any time within one year thereafter the plaintiff may have summons issued.

1887 R. S. Sec. 4651.

Justice may require undertaking for costs or deposits of his fees, before is-

suing summons: Sec. 3694.

Process may be issued to any part of the county: Sec. 3010.

Section 3604. Defendant may Waive Summons: At any time after the complaint is filed the defendant may, in writing, or by appearing and pleading, waive the issuing of summons.

1887 R. S. Sec. 4652.

As to effect of answering after objection to defective process: See note fol-

lowing Section 3607.

Appearance: Sec. 3714.

Section 3605. Parties may Appear in Person or by Attorney: Parties in a justice's court may appear and act in person or by attorney; and any person, except the officer by whom the summons or jury process was served, may act as attorney.

1887 R. S. Sec. 4653.

Section 3606. Appearance of Infant, Insane or Incompetent Person: When an infant, insane, or incompetent person is a party, he must appear either by his general guardian, if he have one, or by a guardian ad litem appointed by the justice. When a guardian ad litem is appointed by the justice, he must be appointed as follows:

1. If the infant, insane, or incompetent person, be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years; if under that age, or if insane or incompetent upon the application of a relative or friends.

2. If the infant, insane or incompetent person, be defendant, the appointment must be made at the time the summons is returned, or before the answer, upon the application of the infant, if he be of the age of fourteen years and apply at or before the summons is returned, if he be under the age of fourteen, or be insane or incompetent, or neglect so to apply, then upon the application of a relative or friend, or any other party to the action, or by the justice on his own motion.

1887 R. S. Sec. 4654.

Section 3607. Summons, Requirements of: The summons must be directed to the defendant, signed by the justice, and must contain:

1. The title of the court, the name of the county, the name of the precinct or city, in which the action is commenced, and the names of the parties thereto;

2. A sufficient statement of the cause of action, in general terms, to apprise the defendant of the nature of the claim against him;

3. A direction that the defendant appear and answer at a time specified in the summons;

4. In an action arising on a contract, for the recovery of money or damages only, a notice that unless the defendant so appears and answers, the plaintiff will take judgment for the sum claimed by him (stating it);

5. In other actions, a notice that unless defendant so appears and answers, the plaintiff will apply to the court for the relief demanded. If the plaintiff has appeared by attorney, the name of the attorney must be indorsed on the summons.

1887 R. S. Sec. 4655.

Summons must not issue with blank spaces to be filled: Sec. 3691.

PRACTICE, DEFECTIVE SERVICE OF PROCESS, WAIVER BY AN ANSWERING OVER: While it appears to be the accepted rule that a party who has objected to the sufficiency of process, by answering over, waives such objection, this rule does not apply to appeals from the justice or probate courts to the district court, under our statutes, which, in such appeals, give either party the benefit of all the legal

objections and exceptions in the court below, and the trial in the district court is *de novo*.—*Chase v. Hagood* (Idaho), 34 Pac. 811.

Omission of initial letter of defendant's middle name in proceedings against him in a justice's court is immaterial.—*Allison v. Thomas*, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89. But where the summons contains the name of another person, as plaintiff, it is fatally defective, and may be quashed on motion or judgment by default thereon may be set aside on motion within ten days after entry, or appeal may be

taken from the judgment; but writ of lie.—Tucker v. Justice's Court, 120 Cal. review to annul the judgment will not 512, 52 Pac. 808.

Section 3608. Time of Appearance of Defendant:

The time specified in the summons for the appearance of the defendant must be as follows:

1. If an order of arrest is endorsed upon the summons, forthwith;
2. In all other cases not less than three nor more than twenty days from its date.

1887 R. S. Sec. 4656.

Section 3609. Alias Summons: If the summons is returned without being served upon any or all of the defendants, the justice, upon the demand of the plaintiff, may issue an alias summons, in the same form as the original, except that he may fix the time for the appearance of the defendant at a period not to exceed ninety days from its date.

The justice may within a year from the date of the filing of the complaint, issue as many alias summons as may be demanded by the plaintiff.

1887 R. S. Secs. 4657 and 4658.

Dore v. Dougherty, 72 Cal. 232, 13 Pac. 621, 1 Am. St. Rep. 48.

Section 3610. Summons, Limitation on Service of:

The summons cannot be served out of the county in which the action is brought, except where the action is brought upon a joint contract, or obligation of two or more persons who reside in different counties, and the summons has been served upon the defendant, resident of the county in which case the summons may be served upon the other defendants out of the county; and except, also, when an action is brought against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county, in which case summons may be served in the county where he resides. When the defendant resides in the county, the summons cannot be served within two days of the time fixed for the appearance of the defendant; when he resides out of the county, and the summons is served out of the county, the summons cannot be served within twenty days of such time.

1887 R. S. Sec. 4659.

Section 3611. Summons, by whom and how Served:

The summons in the cases mentioned in the preceding Section may be served by a sheriff or constable of any of the counties of this State; *Provided*, That when a summons issued by a justice of the peace, is to be served out of the county in which it was issued, the summons shall have attached to it a certificate under seal by the clerk of the district court of such county, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons; or the summons may be served by any male resident over the age of twenty-one years, not a party to the suit, within the county where the action is brought and must be served and returned as provided in actions commenced in the district court; or it may be

served by publication and the Sections of this Code providing for the publication of summons issued out of the district court are applicable to the probate and justices' courts, the necessary changes and substitutions being made therein.

1887 R. S. Sec. 4660.

Provisions for the service, returning, publication of and proof of service, summons in district court: Secs. 3193 to 3199.

Summons must be affirmatively shown to have been served upon the defendant within the territorial jurisdiction of the justice to sustain judgment by default thereon.—*Mallett v. Gold and Silver Mining Co.* 1 Nev. 188, 90 Am. Dec. 484.

Sheriff's return of service of summons may be amended even after judgment and execution sale, to show jurisdiction over the defendant.—*Allison v. Thomas*, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89.

Section 3612. Hour for Appearance: The parties are entitled to one hour in which to appear after the time fixed in the summons, but are not bound to remain longer than the time unless both parties have appeared, and the justice being present, is engaged in the trial of another cause.

1887 R. S. Sec. 4661.

In case of sickness, absence or disability of justice another may act at his

request at the same time and place: Sec. 3693.

CHAPTER CLV.

PLEADINGS IN JUSTICES' COURTS.

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3615. Complaint defined.

3616. Demurrer to complaint.

3617. Answer, what may contain.

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3618. When plaintiff may demur to answer.

3620. Proceedings on demurrer.

3621. Amendment of pleadings.

3622. Answer or demurrer to amended pleadings.

Section 3613. Form of Pleadings: Pleadings in justices' courts:

1. Are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended ;

2. May, except the complaint, be oral or in writing;

3. Need not be verified, unless otherwise provided in this Code;

4. If in writing, must be filed with the justice;

5. If oral, an entry of their substance must be made in the docket.

1887 R. S. Sec. 4666.

Pleadings in justices' courts must be construed with great liberality, and if sufficient facts are stated to show the nature of the claim or defense relied upon, nothing further is required. To

authorize the reversal of a judgment for defects in the pleadings, the defects complained of should be such as were calculated to mislead the adverse party.—*Stuart v. Lander*, 16 Cal. 372, 76 Am. Dec. 538.

Section 3614. Pleadings: The pleadings are:

1. The complaint by the plaintiff;

2. The demurrer to the complaint;

3. The answer by the defendant;

4. The demurrer to the answer.

1887 R. S. Sec. 4667.

Section 3615. Complaint Defined: The complaint in these courts is a concise statement, in writing, of the facts constituting the plaintiff's cause of action; or a copy of the account, note, bill, bond, or instrument upon which the action is based.

1887 R. S. Sec. 4668.

Complaint generally: Sec. 3204.

In an action by a bank on a note in a justice's court, a copy of the note is sufficient complaint, without alleging

therein that such bank is a corporation.

—McFall v. Buckeye Grangers' W.

Assn. 122 Cal. 468, 55 Pac. 253, 68 Am.

St. Rep. 47.

Section 3616. Demurrer to Complaint: The defendant may, at any time before answering, demur to the complaint.

1887 R. S. Sec. 4669.

Demurrer to complaint, generally:
Sec. 3206.

Section 3617. Answer, what may Contain: The answer may contain a denial of any or all of the material facts stated in the complaint, which the defendant believes to be untrue; also a statement in a plain and direct manner, of any other facts constituting a defense or counter claim, upon which an action might be brought by the defendant against the plaintiff in that court.

1887 R. S. Sec. 4670.

Answer, generally: Sec. 3211.

Section 3618. Omission to Set Up Counter Claim, Effect: If the defendant omit to set up a counter claim in the cases mentioned in the last Section, neither he or his assignee can afterwards maintain an action against the plaintiff therefor.

1887 R. S. Sec. 4671.

Counter claim, generally: Sec. 3212.

Section 3619. When Plaintiff may Demur to Answer: When the answer contains new matter in avoidance, or constituting a defense or a counter claim, the plaintiff may, at any time before the trial, demur to the same for insufficiency, stating therein the grounds for such demurrer.

1887 R. S. Sec. 4672.

Demurrer to answer, generally: Sec.
3217.

Section 3620. Proceedings on Demurrer: The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days, as the court allows, amend his complaint;

2. If the demurrer to a complaint is overruled, the defendant may answer forthwith;

3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time, not exceeding two days, as the court may allow;

4. If the demurrer to an answer is overruled the action must proceed as if no demurrer had been interposed.

1887 R. S. Sec. 4673.

Section 3621. Amendment of Pleadings: Either party may, at any time before the conclusion of the trial, amend any pleading; but if the amendment is made after the issue, and it appears to

the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, when an adjournment will, by the amendment, be rendered necessary, require as a condition to the allowance of such amendment, made after issue joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars. The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect; but the application for such relief must be made within ten days after the entry of the judgment, and upon an affidavit showing good cause therefor.

1887 R. S. Sec. 4674.

Amendments, generally: Sec. 3241.

Amendment, adjournment for: Sec. 3635.

Where the court erroneously refuses to grant relief the remedy is by appeal from the judgment and not by writ of review.—Tucker v. Justice's Court, 120 Cal. 512, 52 Pac. 808.

Application for relief against a judgment by default must be by motion, and the mere making of a written application is not sufficient; but the attention of the court must be called to it, and the court moved to grant it, or some present action requested, upon notice to the opposite party, before the expiration of the time limited. But the hearing may be continued without loss of jurisdiction.—Spencer v. Branham, 109 Cal. 336, 41 Pac. 1095.

JUDGMENT, RELIEF AGAINST IN EQUITY: Where the judgment was procured by fraud relief may be had under this section, but the remedy is not exclusive. After the time for an ap-

peal has elapsed relief may be had in equity.—Merriam v. Walton, 105 Cal. 403, 38 Pac. 1108, 45 Am. St. Rep. 50.

A justice's court has no jurisdiction to interfere with its judgments except in the manner provided by law; and it has no power, more than ten days after the entry of a judgment by default, to vacate it upon the ground of mistake, surprise, or excusable neglect of the defendant; nor has it jurisdiction, upon a motion of the defendant, made more than forty days after the judgment, to hear and determine issues of law and fact as to whether, after service of summons upon the defendant in another county, an answer addressed to the justice and sent by mail, and received by the constable, in the absence of the justice, had been filed prior to the default, or to order such answer filed *nunc pro tunc*. Such orders are without jurisdiction, and should be annulled on certiorari.—Simon v. Justice's Court, 127 Cal. 45.

Section 3622. Answer on Demurrer to Amended Pleadings: When a pleading is amended, the adverse party may answer or demur to it within such time, not exceeding two days, as the court may allow.

1887 R. S. Sec. 4675.

CHAPTER CLVI.

PROVISIONAL REMEDIES IN JUSTICES' COURTS.

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3623. Order of arrest of defendant.

3624. Order executed in any part of state.

3625. Affidavit and undertaking for order of arrest.

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3628. Officer must detain defendant.

3629. Writ of attachment shall issue upon affidavit.

3630. Undertaking on attachment must be required.

3631. Writ of attachment, substance of.

3632. Certain provisions of code to apply.

3633. How claim and delivery enforced.

Section 3623. Order of Arrest of Defendant: An order to arrest the defendant may be indorsed on a summons issued out of a justice's court, and the defendant may be arrested thereon by the sheriff or constable, at the time of serving the summons, and brought before the justice, and there detained until duly discharged, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract when the defendant is about to depart from the State, with intent to defraud his creditors;

2. In an action for a fine or penalty, or for money or property embezzled or fraudulently misapplied, or converted to his own use by one who received it in a fiduciary capacity;

3. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought;

4. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors. But no female can be arrested in any action.

1887 R. S. Sec. 4680.

Arrest and bail generally: Sec. 3244 et seq.

Process may be issued to any part of the county: Sec. 3010.

Arrest and bail, judgment: Sec. 3656.

Executions: Sec. 3665.

Summons where order of arrest endorsed thereon, made returnable forthwith: Sec. 3608.

No imprisonment for debt except in cases of fraud: Art. 1, Sec. 15, Const.

Section 3624. Order Executed in any Part of State:

In cases under the first subdivision of the last Section, or when the defendant is about to depart from the State, the order of arrest may be executed, and the defendant arrested in any part of the State.

1887 R. S. Sec. 4681.

Section 3625. Affidavit and Undertaking for Order of Arrest: Before an order for an arrest can be made, the party applying must prove to the satisfaction of the justice by the affidavit of himself, or some other person, the facts upon which the application is founded. The plaintiff must also execute and file a written undertaking in the sum of three hundred dollars, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking.

1887 R. S. Sec. 4682.

Undertakings on arrest: Sec. 3248.

Undertakings, qualifications of sureties, etc.: Secs. 3749 et seq.

Section 3626. Defendant must be Taken Before a Justice Immediately: The defendant, immediately upon being arrested, must be taken to the office of the justice who made the order, and if he is absent or unable to try the action, or if it appears to him by the affidavit of the defendant that he is a material witness in the action, the officer must immediately take the defendant before another justice of the precinct or city, if there is another, and if not then before the justice of an adjoining precinct or city, who must

take jurisdiction of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him.

1887 R. S. Sec. 4683.

Section 3627. Officer must give Notice to Plaintiff:

The officer making the arrest must immediately give notice thereof to the plaintiff, or his attorney or agent, and indorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff.

1887 R. S. Sec. 4684.

Section 3628. Officer must Detain Defendant: The officer making the arrest must keep the defendant in custody until he is discharged by order of the court.

1887 R. S. Sec. 4685.

Section 3629. Writ of Attachment Shall Issue upon Affidavit:

A writ to attach the property of the defendant must be issued by the justice at the time of, or after issuing summons and before answer, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit for attachment out of the district court.

1887 R. S. Sec. 4686.

Attachment, generally: Sec. 3294 et seq.

Attachment, affidavit for: Sec. 3295.

Process may be issued to any part of the county: Sec. 3010.

Judgment: Sec. 3655.

Execution: Sec. 3665.

Section 3630. Undertaking on Attachment must be Required:

Before issuing a writ, the justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, in a sum not less than fifty nor more than three hundred dollars, to the effect that if the defendant recover judgement the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

1887 R. S. Sec. 4687.

Undertakings, state, county and of officers not required to give: Sec. 3750.

Statutory form applicable to all, undertakings: Sec. 3752.

Deposit may be received in lieu of undertaking: Sec. 3697.

Attachment bond in an action exceeding jurisdiction is void. So is a bond taken after the dismissal of the action. Nor can a recovery be had upon the bond where levy was disregarded and no actual injury shown.—Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332.

Section 3631. Writ of Attachment, Substance of:

The writ may be directed to the sheriff or any constable of the county, or the sheriff of any other county, and must require him to attach and safely keep all the property of the defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand besides costs, in which case to take such undertaking,

1887 R. S. Sec. 4688.

Section 3632. Certain Provisions of Code Apply to:

The Sections of this Code providing for attachments out of the district court, except as in this Chapter expressly provided, are applicable to attachments issued out of justices' courts, the necessary changes and substitutions being made therein.

1887 R. S. Sec. 4689.

Provision for attachment in district court: Secs. 3294-3317.

Section 3633. How Claim and Delivery Enforced:

In an action to recover possession of personal property, the plaintiff may at the time of issuing summons or at any time thereafter before answer, claim the delivery of such property to him; and the Sections of this Code providing the practice in proceedings for claim and delivery of personal property in the district court are applicable to like proceedings in justices' court, the necessary changes and substitutions being made therein.

1887 R. S. Sec. 4690.

Claim and delivery, generally: Secs. 3271 et seq.

Extent of jurisdiction of justice's courts in claim and delivery: Sec. 3008,

Sub. 5.

Undertaking required to stay execution on appeal: Sec. 3687.

Judgment: Sec. 3655.

Execution: Sec. 3665.

CHAPTER CLVII.**TRIALS IN JUSTICES' COURTS.****TIME OF TRIAL AND POSTPONEMENTS.**

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ISSUES AND TRIALS.

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3646. Challenges to jurors.

3647. Manner of pleading written instrument.

3648. If copy of instrument filed, signatures deemed admitted.

TIME OF TRIAL AND POSTPONEMENT.**Section 3634. Time when Trial must be Commenced:**

Unless postponed as provided in this Chapter, or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the summons for the appearance of defendant, and the trial must be continued, without adjournment for more than twenty-four hours at any one time, until all the issues therein are disposed of.

1887 R. S. Sec. 4701.

Provisional remedies, justices' courts, arrest and bail, effect of postponement of trial on: Sec. 3637.

In case of sickness, absence or disability of justice another may act at his request at the same time and place: Sec. 3693.

Section 3635. Postponement on Court's own Motion:

The court may, of its own motion, postpone the trial:

1. For not exceeding one day, if, at the time fixed by law or by

an order of the court for the trial, the court is engaged in the trial of another action;

2. For not exceeding two days, if, by an amendment of the pleadings, of the allowance of time to make such amendment or to plead, a postponement is rendered necessary;

3. For not exceeding three days, if the trial is upon issues of fact, and a jury has been demanded.

1887 R. S. Sec. 4702.

Sub. 2. Amendment of pleadings:
Secs. 3620-3621.

Section 3636. Postponement by Consent: The court may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.

1887 R. S. Sec. 4703.

Section 3637. Postponement on Application of a Party: The trial may be postponed upon the application of either party for a period not exceeding four months:

1. The party making the application must prove, by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so;

2. If the application is on the part of the plaintiff, and the defendant is under arrest, a postponement for more than three hours discharges the defendant from custody, but the action may proceed notwithstanding, and the defendant is subject to arrest on execution, in the same manner as if he had not been discharged;

3. If the application is on the part of a defendant under arrest, before it can be granted he must execute an undertaking, with two or more sufficient sureties, to be approved by, and in a sum to be fixed by, the court, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action, not exceeding the amount specified in the undertaking. On filing the undertaking specified in this subdivision, the court must order the defendant to be discharged from custody;

4. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the court, and that the testimony so taken may be read on the trial with the same effect, and subject to the same objections as if the witness was produced; but the court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial or offered and overruled as improper, the trial must not be postponed.

1887 R. S. Sec. 4704.

Section 3638. Continuance Exceeding Ten Days, Conditions in Force, Effect of: No adjournment must, unless by consent, be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking in an amount fixed by the court, with two sureties, to be approved by the court, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, not exceeding the sum specified in the undertaking.

1887 R. S. Sec. 4705.

Deposit may be received in lieu of undertaking: Sec. 3697.

ISSUES AND TRIAL.

Section 3639. Issue Defined, Kinds: Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and
2. Of fact.

1887 R. S. Sec. 4711.

Section 3640. Issue of Law, how Raised: An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

1887 R. S. Sec. 4712.

Section 3641. Issue of Fact, how Raised: An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; and,
2. Upon new matter in the answer, except an issue of law is joined thereon.

1887 R. S. Sec. 4713.

Section 3642. Issue of Law, how Tried: An issue of law must be tried by the court.

1887 R. S. Sec. 4714.

Section 3643. Issue of Fact, how Tried: An issue of fact must be tried by a jury, unless a jury is waived, in which case it must be tried by the court.

1887 R. S. Sec. 4715.

Numbers of jurors in justice's court: Sec. 3047, and Art. I, Sec. 7, Const.

Provisions for summoning jurors: Secs. 3071 to 3073 and 3081.

As to manner of selecting jurors: Sec. 3081.

Justices' courts, pay of jurors: Sec. 3086.

Jury trial, verdict and judgment, docket entries required: Sec. 3674.

TRIAL BY JURY, JUSTICES' COURT: Under the statutes of this state a court is not authorized to make a rule requiring a litigant to deposit juror's fees, as a condition precedent to the right of a trial by jury.—*Randall v. Kelsey* (Idaho), 61 Pac. 515.

Section 3644. Jury, how Waived: A jury may be waived:

1. By the consent of parties, entered in the docket;
2. By a failure of either party to demand a jury before the commencement of the trial of an issue of fact;

3. By the failure of either party to appear at the time fixed for the trial of an issue of fact.

1887 R. S. Sec. 4716.

Section 3645. Either Party Failing to Appear: If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party.

1887 R. S. Sec. 4717.

Section 3646. Challenges to Jurors: The challenges are either peremptory or for cause. Each party is entitled to three peremptory challenges. Each party may challenge for cause on any grounds set forth as grounds of such challenge in the district court. Challenges for cause must be tried by the court.

1887 R. S. Sec. 4718.

Grounds of challenge for cause: Sec. 3461.

Section 3647. Manner of Production of Written Instrument: When the cause of action or counter claim arises upon an account or instrument for the payment of money only, the court, at any time before the trial, may, by an order under his hand, require the original to be exhibited to the inspection of, and a copy to be furnished, to the adverse party, at such time as may be fixed in the order; or, if such order is not obeyed, the account or instrument cannot be given in evidence.

1887 R. S. Sec. 4719.

Order for inspection: Sec. 3705.

Section 3648. If Copy of Instrument Filed, Signatures Deemed Admitted: If the plaintiff annex to his complaint or file with the court at the time of issuing the summons, the original or a copy of the promissory note, bill of exchange, or other written obligation for the payment of money; upon which the action is brought, the defendant is deemed to admit the genuineness of the signatures of the makers, indorsers, or assignors thereof, unless he specifically deny the same in his answer, and verify the answer by his oath.

1887 R. S. Sec. 4720.

CHAPTER CLVIII.

JUDGMENTS IN JUSTICES' COURTS.

Section.

JUDGMENT BY DEFAULT.

3649. Judgment when defendant fails to appear.

3650. Judgment against defendant on demurrer.

JUDGMENTS OTHER THAN BY DEFAULT.

3651. Judgment by confession.

3652. Judgment, dismissal.

3653. Judgment upon verdict.

3654. Judgment after trial by the court.

Section.

3655. Judgment, how entered.

3656. When defendant subject to arrest.

3657. Sum exceeding jurisdiction, excess may be remitted.

3658. Offer to compromise before trial.

3659. Costs taxed included in judgment.

3660. Abstract of judgment.

3661. Abstract filed and docketed in clerk's office.

3662. Effect of docketing.

3663. Judgment not a lien unless abstract docketed.

JUDGMENT BY DEFAULT.

Section 3649. Judgment when Defendant Fails to Appear: When the defendant fails to appear and answer or demur at the time specified in the summons, or within one hour thereafter, the court must hear the evidence offered by the plaintiff, and must render judgment in his favor for such a sum (not exceeding the amount stated in the summons), as appears by such evidence to be just.

1887 R. S. Sec. 4695.

Summons must affirmatively appear to have been served on the defendant to sustain judgment.—*Mallett v. Gold and Silver Mining Co.* 1 Nev. 188, 90 Am. Dec. 484.

Injunction will not lie to restrain the sale of goods on execution issued on a justice's judgment rendered by default,

but void because the court never acquired jurisdiction of the person of defendant. The remedy is by motion to set aside the execution sale—*Lugo v. Brown*, 73 Cal. 3, 14 Pac. 366, 2 Am. St. Rep. 772. When obtained by fraud, relief from in equity.—*Merriam v. Walton*, 105 Cal. 403, 38 Pac. 1108, 45 Am. St. Rep. 50.

Section 3650. Judgment Against Defendant on Demurrer: In the following cases the same proceedings must be had, and judgment must be rendered in like manner, as if the defendant had failed to appear and answer or demur:

1. If the complaint has been amended, and the defendant fail to answer it as amended, within the time allowed by the court;.
2. If the demurrer to the complaint is overruled, and the defendant fails to answer at once;
3. If the demurrer to the answer is sustained, and the defendant fails to amend the answer within the time allowed by the court.

1887 R. S. Sec. 4696.

Proceedings on demurrer: Sec. 3620.

JUDGMENTS, OTHER THAN BY DEFAULT.

Section 3651. Judgment by Confession: Judgments upon confession may be entered in any justice's court specified in the confession, in any amount of which the court has jurisdiction.

1887 R. S. Sec. 4725.

Judgment by confession: Secs. 3958-3955.

Judgment by confession, statement, docket entries, form of transcript: Sec. 3958.

Section 3652. Judgment, Dismissal: Judgment that the action be dismissed, without prejudice to a new action, may be entered with costs, in the following cases:

1. When the plaintiff voluntarily dismisses the action before it is finally submitted;
2. When he fails to appear at the time specified in the summons, or at the time to which the action has been postponed, or within one hour thereafter;
3. When, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court;
4. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or precinct, or city; but if the objection is taken and overruled, it is cause only of reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial it is waived.

1887 R. S. Sec. 4726.

Non-suit, generally: Sec. 3499.

OBJECTION TO JURISDICTION:

Where defendants, sued in justice court of wrong county, objected to jurisdiction by motion to dismiss by special demurrer and by answer, reserving all ob-

jections, upon appeal from an adverse judgment, upon questions of both law and facts, the district court may dispose of the defense of want of jurisdiction before considering the merits of the case.—*Holbrook, Etc. v. Superior Court*, 106 Cal. 589, 39 Pac. 936.

Section 3653. Judgment upon Verdict: When a trial by jury has been had, judgment must be entered by the court at once, in conformity with the verdict.

1887 R. S. Sec. 4727.

Section 3654. Judgment after Trial by the Court: When the trial is by the court, judgment must be entered at the close of the trial.

1887 R. S. Sec. 4728.

Under Civil Code Section 603 containing same provision, the action of the probate court in entering the formal judgment for the plaintiff nunc pro tunc after the appeal had been taken to the district court, was void.—*Gray v. Cederholm*, 2 Idaho, 41, 3 Pac. 12,

JUDGMENT. VALIDITY: A judgment which recites that defendant was duly summoned and failed to answer, that evidence was heard, the cause submitted, and the court being sufficiently advised, doth adjudge that the plaintiff recover from the defendant the sum of \$82.63 with interest and costs dated and signed by the justice, is a valid

judgment.—*Ollis v. Kirkpatrick*, 2 Idaho, 976, 28 Pac. 435.

The fact that the docket fails to show continuance when judgment was entered by default two days after the date to which the last continuance appeared to have been made, will not render the judgment void.—*Green v. Christie* (Idaho), 40 Pac. 54.

A judgment of the justice of the peace in favor of a bank is not void, although the record fails to affirmatively show the corporate capacity of the bank. The judgment cannot be collaterally attacked on that ground to avoid a sale under execution.—*McFall v. Buckeye Grangers' Assn.* 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47.

Section 3655. Judgment, how Entered: The judgment must be entered substantially in the form required by this Code.

1887 R. S. Sec. 4729; first portion.

Judgment, generally: Secs. 3502 et

Judgments, actions for nuisances: seq.
Sec. 3373.

Section 3656. When Defendant Subject to Arrest: When the judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, the fact that the defendant is so subject must be stated in the judgment.

1887 R. S. Sec. 4729, last portion.

Arrest on final process: Sec. 3373.

Final process may be issued to any part of the county: Sec. 3010.

Section 3657. Sum Exceeding Jurisdiction, Excess may be Remitted: When the amount found due to either party exceed the sum for which the court is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

1887 R. S. Sec. 4730.

Section 3658. Offer to Compromise Before Trial: If the defendant, at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum in excess of the offer, he cannot

recover costs; but costs must be adjudged against him, and if he recover, be deducted from his recovery. The offer and failure to accept cannot be given in evidence, nor affect the recovery otherwise than as to costs.

1887 R. S. Sec. 4731.

Offer to compromise: Sec. 3704.

Section 3659. Costs Taxed Included in Judgment:

The court must tax and include in the judgment the costs allowed by law to the prevailing party.

1887 R. S. Sec. 4732.

Costs on judgment by confession:
Sec. 3958.

Section 3660. Abstract of Judgment: The probate court or justice of the peace, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in the following form (filling blanks according to the facts):

State of Idaho, County of.....plaintiff,
vs....., defendant, In pro-
bate Court of.....County, (or, In Justice Court, before.....
Justice of the Peace, of.....Precinct, or City),.....
19...., (insert date of abstract). Judgment entered for plain-
tiff (or defendant) for....dollars, on theday of.....,
19....

I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court, or (as the case may be) in the court of..... justice of the peace, as appears by his docket, now in my possession, as his successor in office, signed by the clerk of the probate court and attested by its seal, or signed by the justice, as the case may be.

1887 R. S. Sec. 4733.

Section 3661. Abstract Filed and Docketed in Clerk's Office:

The abstract may be filed and docketed in the office of the district clerk of the county in which the judgment was rendered, and must be docketed in the judgment docket of the district court. The time of the receipt of the abstract by the clerk must be noted by him thereon, and entered in the docket.

1887 R. S. Sec. 4734.

Judgment, docketing: Sec. 3510.
Filing transcript: Sec. 3513.

Section 3662. Effect of Docketing: From the time of docketing in the district clerk's office, execution may be issued thereon by the district clerk to the sheriff of any county in the State, in the same manner and with like effect as if issued on judgments of the district courts.

1887 R. S. Sec. 4735.

Section 3663. Judgment not a Lien Unless Abstract Docketed:

A judgment rendered in a probate or justice's court creates no lien upon any lands of the defendant, unless such an abstract is filed and docketed in the office of the clerk of the district court of the county in which the lands are situated. When so filed and docketed, such judgment is a lien upon the lands of the judg-

ment debtor situated in that county, not exempt from execution owned by him at the time, or which he may afterwards, and before the lien expires acquire. The lien continues for two years, unless the judgment be previously satisfied.

1887 R. S. Sec. 4736.

HOMESTEAD EXEMPTIONS: The homestead is exempt from sale under justice court executions levied prior to

the declaration of homestead, where the judgment had not been made a lien by filing an abstract thereon.—*Beaton v. Reid*, 111 Cal. 484, 44 Pac. 167.

CHAPTER CLIX.

EXECUTIONS FROM PROBATE AND JUSTICES' COURTS.

Section.

3664. Execution may issue within five years.

3665. Execution, contents of.

3666. Renewal of execution.

Section.

3667. Duty of officer receiving execution.

3668. Certain provisions made applicable.

Section 3664. Execution may Issue within Five Years: Execution for the enforcement of a judgment may be issued by the clerk of the probate court under the seal of the court, or by the justice who entered the judgment, or his successor in office, on the application of the party entitled thereto, at any time within five years from the entry of judgment.

1887 R. S. Sec. 4741.

Executions, generally: Secs. 3531 et seq.

Section 3665. Execution, Contents of: The executions must be directed to the sheriff or to a constable of the county, and must be subscribed by the clerk or justice and bear date the day of its delivery to the officer. It must intelligibly refer to the judgment, by stating the names of the parties and the name of the court or justice before whom, and of the county where, and the time when it was rendered; the amount of judgment if it be for money; and if less than the whole is due, the true amount due thereon. It must contain in like cases, similar directions to the sheriff or constable as are required in executions issued from the district court.

1887 R. S. Sec. 4742.

Manner of issuance and service of execution, from district court: Chap. CLXIX, Secs. 3531 to 3569.

Final process may be issued to any part of the county: Sec. 3010.

Execution left with blank spaces to be filled is void: Sec. 3691.

In certain cases, a constable may execute and return an execution issued out of a probate court, and may justify under it, if it is valid on its face.—*Coombs v. Collins* (Idaho), 57 Pac. 310.

Section 3666. Renewal of Execution: An execution may, at the request of the judgment creditor be renewed before the expiration of the time fixed for its return, by the word "renewal" written thereon, with the date thereof, and subscribed by the clerk or justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterwards issued.

1887 R. S. Sec. 4743.

If the justice erroneously directs an execution which had been issued under

such judgment to be returned unsatisfied, and his order is complied with, he may be compelled by mandamus to is-

sue another execution, his duty to do so being purely ministerial.—Town of Hayward v. Pimental, 107 Cal. 386, 40 Pac. 545.

Section 3667. Duty of Officer Receiving Execution:

The sheriff or constable to whom the execution is directed must execute the same in the same manner as the sheriff is required to proceed upon execution directed to him, and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff.

1887 R. S. Sec. 4744.

As to power of sheriff in serving executions, generally: Chap. CLXIX, Secs. 3531 to 3561.

Injunction will not lie to restrain a void justice's judgment; the remedy is

by motion to set the execution aside.—*Luco v. Brown*, 76 Cal. 3, 14 Pac. 366, 2 Am. St. Rep. 772. The decisions in other states upon this point are conflicting.—See note 31 L. R. A. 200. *Freeman on Judgments*, Sec. 497.

Section 3668. Certain Provisions made Applicable:

The provisions of this Code as to proceedings supplementary to execution in the district court are applicable to probate and justices' courts, the necessary changes and substitutions being made therein.

1887 R. S. Sec. 4745.

Proceedings supplementary to execution: Secs. 3562 et seq.

Costs on these proceedings are recoverable by the prevailing party: Sec. 3695.

CHAPTER CLX.

CONTEMPTS IN JUSTICES' COURTS.

Section.

3669. Contempts, may punish for.

3670. Proceedings for contempt before judge.

3671. Proceedings for contempt.

Section.

3672. Punishments for contempt.

3673. Conviction must be entered in docket.

Section 3669. Contempts, may Punish for: A probate judge or justice may punish as for contempt, persons guilty of the following acts, and no other:

1. Disorderly, contemptuous or insolent behavior towards the judge or justice while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. A breach of the peace, boisterous conduct or violent disturbance in the presence of the judge or justice, or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding;

3. Disobedience or resistance to the execution of a lawful order or process, made or issued by him;

4. Disobedience to a subpoena duly served, or refusing to be sworn or to answer as a witness;

5. Rescuing any person or property in the custody of an officer by virtue of an order or process in the court held by him.

1887 R. S. Sec. 4750.

Contempt generally: Secs. 3819 et seq.

Powers of judicial officers: Secs.

3013 to 3042.

Section 3670. Proceedings for Contempt, before Judge: When a contempt is committed in the immediate view and presence of the judge or justice, it may be punished summarily;

to that end an order must be made reciting the facts as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed.

1887 R. S. Sec. 4751.

Section 3671. Proceedings for Contempt: When the contempt is not committed in the immediate view and presence of the judge or justice, a warrant of arrest may be issued by such judge or justice, on which the person so guilty may be arrested and brought before the judge or justice immediately, when an opportunity to be heard in his defense or excuse must be given. The judge or justice may thereupon discharge him, or may convict him of the offense.

1887 R. S. Sec. 4752.

Section 3672. Punishments for Contempt: The judge or justice may punish for contempts by fine or imprisonment, or both, such fine not to exceed, in any case, one hundred dollars, and such imprisonment one day.

1887 R. S. Sec. 4753.

Section 3673. Conviction must be Entered in Docket: The conviction specifying particularly the offense and the judgment thereon, must be entered in the docket.

1887 R. S. Sec. 4754.

CHAPTER CLXI.

DOCKET OF PROBATE COURT AND JUSTICES OF THE PEACE.

Section.	Section.
3674. Docket, what to contain.	3679. Proceedings, office vacant, successor not appointed.
3675. Entries primary evidence of the fact.	3680. May issue process upon docket of his predecessor.
3676. Index to docket must be kept.	3681. Successor of a justice, who shall be deemed.
3677. Must deliver records, etc., to successor.	3628. Two justices equally entitled, probate judge designates.
3678. Neglect to deliver records to successor, penalty.	

Section 3674. Docket, what to Contain: Every probate court and justice must keep a book denominated a "docket," in which must be entered:

1. The title of every action or proceeding;
2. The object of the action or proceeding; and if a sum of money be claimed, the amount thereof;
3. The date of the summons and the time of its return and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of the fact;
4. The time when the parties, or either of them appear, of their non-appearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleading;
5. Every adjournment, stating on whose application and to what time;

6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the return of the jury and for the trial;

7. The names of the jurors who appear and are sworn, and the names of all witnesses sworn, and at whose request;

8. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge;

9. The judgment of the court specifying the costs included and the time when rendered;

10. The issuing of the execution, when issued, and to whom; the renewals thereof, if any, and when made, and a statement of any money paid to the court, when and by whom;

11. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed.

1887 R. S. Sec. 4759.

Cases where another justice is called in, justice absent, sick or disable, the entries are made upon the docket of the original justice: Sec. 3693.

A judgment of a probate or justice court will not be held void, for the reason that a continuance of two days was had and not noted in the docket.—*Green v. Christie* (Idaho), 40 Pac. 54.

Sections 3674 and 3675 do not make a recital in the justice's docket of the service of summons prima facie evidence of that fact. No provision is made for such recital; and it cannot establish jurisdiction of the person of the defendant, so as to sustain an action upon a judgment by default rendered in the justice's court.—*Fisk v. Mitchell*, 124 Cal. 359, 57 Pac. 149.

Section 3675. Entries, Primary Evidence of the Fact: The several particulars of the last Section specified must be entered under the title of the action to which they relate, and (unless otherwise in this Code provided), at the time when they occur. Such entries in a probate or justice's docket, or a transcript thereof, certified by the clerk or justice, or his successor in office, are primary evidence of the fact stated.

1887 R. S. Sec. 4760.

Section 3676. Index to Docket must be Kept: The clerk of the probate court and every justice of the peace must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiff must be entered in the index, in the alphabetical order of the first letter of the family name.

1887 R. S. Sec. 4761.

Section 3677. Must Deliver Records, etc., to Successor: Every probate judge and every justice of the peace upon the expiration of his term of office, must deposit with his successor, his official dockets, statutes, and session laws, and all other books, papers and documents pertaining to his office, as well his own as those of his predecessor, or any other which may be in his custody to be kept as public records.

1887 R. S. Sec. 4762, amended 1899, 5th Ses. p. 401.

Section 3678. Neglect to Deliver Records to Successor, Penalty: Every probate judge and every justice of the peace whose duty it is to deliver over the dockets, books, records, and papers as prescribed in Section 3677, shall forfeit and pay, for the

use of the county, twenty-five dollars, for every three months neglect, after due demand in writing by his successor in office, to perform such duty, which sum may be recovered at the suit of any person. The sum so recovered shall be paid into the current expense fund of the county.

1887 R. S. Sec. 4767, amended 1899, 5th Ses. p. 401.

Section 3679. Proceedings, Office Vacant, Successor not Appointed: If the office of justice becomes vacant by his death or removal from the precinct or city or otherwise, before his successor is elected and qualified, the docket, and papers in possession of such justice must be deposited in the office of some other justice in the precinct, to be by him delivered to the successor of such justice. If there is no other justice in the precinct, then the docket and papers of such justice must be deposited in the office of the county recorder of the county, to be by him delivered to the successor in office of the justice.

1887 R. S. Sec. 4763.

Section 3680. May Issue Process upon Docket of his Predecessor: Any probate judge having the docket of his predecessor, and any justice with whom the docket of his predecessor, or of any other justice, is deposited, has and may exercise over all actions and proceedings entered in such docket, the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come, is, for the purposes of this Section, considered the successor of such former justice.

1887 R. S. Sec. 4764.

Section 3681. Successor of a Justice, who Shall be Deemed: The justice elected to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same precinct or city, from that time is the successor.

1887 R. S. Sec. 4765.

Section 3682. Two Justices Equally Entitled; Probate Judge Designates: When two or more justices are equally entitled, under the last Section, to be deemed the successors in office of the justice, the probate judge must by a certificate subscribed by him and filed in the office of the county recorder, designate which justice is the successor of a justice going out of office, or whose office has become vacant.

1887 R. S. Sec. 4766.

CHAPTER CLXII.

APPEALS FROM PROBATE AND JUSTICES' COURTS TO DISTRICT COURT.

Section.

3683. Appeal from judgment.

3684. Appeal, question of law, statement required.

3685. Appeal upon questions of fact.

3886. Transmission of the case, record required.

Section.

3687. Undertaking on appeal, justification of sureties.

3688. On filing undertaking, execution stayed.

3689. Miscellaneous provisions on trials.

Section 3683. Appeal from Judgment: Any party dissatisfied with a judgment rendered in a civil action in a probate or justice's court, may appeal therefrom to the district court of the county, at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from part, what part, and whether the appeal is taken on questions of law or fact, or both.

1887 R. S. Sec. 4838.

District court has jurisdiction: Sec. 2996.

Certiorari, when review may be had upon: Sec. 3758.

APPEALS TO DISTRICT COURT FROM BOARD OF COUNTY COMMISSIONERS, PROVISIONS ARE CONTAINED IN POLITICAL CODE: Such appeals may be taken within twenty days after publication of statement of proceedings by party aggrieved or tax payer: Sec. 1608.

Notice of appeal must clearly refer to act complained of and be served upon the clerk. Hearing may be summary in certain cases. No bond required when appeal to protect public interests: Sec. 1609.

Clerk must transmit papers within five days: Sec. 1610.

Trial de novo. May affirm, reverse or modify.

Appeal to supreme court within five days: Sec. 1611.

Costs against losing party except when in good faith—against commissioners who act fraudulently, etc.: Sec. 1613.

DEFECTIVE JUDGMENT: Where the docket entries of probate court merely show that the complaint was filed, a summons issued and served and a demurrer to a complaint filed there being no entry showing what disposition was made of the demurrer or for which party judgment was rendered, an entry of damages for \$310.00 is not sufficient to constitute a judgment, even though the fee bill made by the court contains a charge for the overruling of defendant's demurrer and the

entry of default for want of answer; and from such judgment, no appeal will lie.—Gray v. Cederholm, 2 Idaho, 41, 3 Pac. 12.

APPEAL TO DISTRICT COURT, SERVICE OF NOTICE: Code of Civil Proc. Section 665 (3844), provides that any person dissatisfied with a justice's judgment may appeal therefrom to the district court, at any time within thirty days after the rendition of the judgment, by filing a notice of the appeal with the justice, and serving a copy on the adverse party. Section 669 provides that such an appeal is not effectual until an undertaking is filed. Held, that an appeal from a justice's judgment rendered October 2nd was well taken, where it appeared that the notice and undertaking were filed with the justice on the 6th, and a copy of the notice on the adverse party on the 15th: the order of the filing of the undertaking and the service of the copy being immaterial.—Salt Lake Brewing Co. v. Gillman, 2 Idaho, 180, 10 Pac. 32.

JUDGMENT BY CONSENT, RIGHT OF APPEAL: Where in a suit before a justice for \$150.00, being above the amount which justices have original jurisdiction of all the allegations of the complaint were denied, but to expedite an appeal defendant, by agreement of both parties consented to pro forma judgment against him, reserving all his rights under an appeal, this consent does not deprive him of his right to be heard in a circuit court, and his appeal was improperly dismissed.—Harvey v. Bunker Hill & Sullivan Mining Co. 2 Idaho, 732, 24 Pac. 30.

Note.—Under the present status of

the law, justice's court only has concurrent jurisdiction below \$100.00, provision being simply that plaintiff shall not recover costs unless the amount recovered is equal to \$100.00.

APPEAL FROM PROBATE COURT: The statute does not provide an appeal from an order of the probate court made in a proceeding supplementary to execution and the only means of reviewing such order is by writ of review.—*Gans v. Steele* (Idaho), 61 Pac. 286.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION: Order to debtor is not appealable.—*Wells v. Torrance*, 119 Cal. 437, 51 Pac. 626.

Orders of a justice's court declaring void the judgment by default, and staying execution thereon, and ordering the answer sent by mail to be filed nunc pro tunc, as of a date prior to the judgment, made more than forty days after its rendition, are without jurisdiction, and should be annulled upon certiorari.—*Simon v. Justice's Court*, 127 Cal. 45.

Notice of appeal is waived by the appearance of the adverse party in the appellate court.—*McLearn v. Shartzler*, 5 Cal. 70, 63 Am. Dec. 84; *Reynolds v. Corbus* (Idaho), 63 Pac. 884.

Section 3684. Appeal. Question of Law, Statement Required: When a party appeals to the district court on questions of law alone, unless the question arises upon the pleadings or files in the action, or appears from the docket of the court, he must, within ten days from the rendition of judgment prepare a statement of the case, and file the same with the justice or judge. The statement must contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds and no more. With ten days after he receives notice that the statement is filed, the adverse party if dissatisfied with the same, may file amendments. The proposed statement and amendments must be settled by the justice or judge, and if no amendment be filed, the original statement stands as adopted. The statement thus adopted, or as settled by the justice or judge, with a copy of the docket of the justice or judge, and all motions filed with him by the parties during the trial, and the notice of appeal, may be used on the hearing of the appeal before the district court.

1887 R. S. Sec. 4839.

Section 3685. Appeal upon Questions of Fact: When a party appeals to the district court on questions of fact, or on questions of both law and fact, no statement need be made, but the action be tried anew in the district court.

1887 R. S. Sec. 4840.

Where a case is appealed from the probate court, to the district court, and is tried in the district court de novo, and is appealed to the supreme court as from an original case in the district court, the supreme court will not consider anything anterior to the proceed-

ings of the district court.—*Chase v. Ha-good* (Idaho), 34 Pac. 812.

APPEALS FROM COUNTY COMMISSIONERS: Upon an appeal from order of county commissioners to district court, there must be a trial de novo by the district court.—*Campbell v. Board County Com'rs Canyon Co.* (Idaho), 46 Pac. 1022.

Section 3686. Transmission of the Case, Record Required: Upon receiving the notice of appeal, and on payment of the fees of the court or justice and filing an undertaking as required in the next Section, and after settlement or adoption of statement, if any, the clerk or justice must, within five days, transmit to the clerk of the district court, if the appeal be on questions of law alone, the pleadings and files in the action, a certified copy of his docket, the statement, if any, as admitted or as settled, the notice of appeal

and the undertaking filed; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions, and other papers filed in the cause, the notice of appeal and the undertaking filed and the justice or judge may be compelled by the district court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice or judge by the party or his attorney. In the district court, either party may have the benefit of all legal objections made in probate or justices' courts. And the district court has the same power to grant relief by amendment and otherwise, as in actions commenced in the district court.

1887 R. S. Sec. 4841.

PRACTICE, DEFECTIVE SERVICE OF PROCESS, WAIVER BY ANSWERING OVER: While it appears to be the accepted rule that a party who has objected to the sufficiency of process, by answering over, waives such objection, this rule does not apply to appeals from justice and probate courts to district court, under our statutes, which, in such appeals, give either

party the benefit of all legal exceptions and objections in the court below, and the trial in the district court is *de novo*.—*Chase v. Hagood* (Idaho), 34 Pac. 811.

APPEAL FROM INFERIOR COURTS, PLEADING, AMENDMENTS: Under Section 4841 the district court may allow amendments to pleading in actions appealed from justice or probate courts.—*Sebree v. Smith*, 2 Idaho, 320, 16 Pac. 915.

Section 3687. Undertaking on Appeal, Justification of Sureties: An appeal from a justice's or probate court is not effectual for any purpose, unless an undertaking be filed, with two or more sureties, in the sum of one hundred dollars, for the payment of the costs on the appeal; or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property, and must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment, and all costs that may be recovered against him in the action in the district court. When the action is for the recovery of specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the district court, and will obey any order made by the court therein. When the judgment appealed from directs the delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit or suffer to be committed, any waste thereon, and that if the appeal be dismissed or withdrawn, or the judgment affirmed, or judgment be recovered against him in the action in the district court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof; or that

he will pay any judgment and costs that may be recovered against him in said action in the district court, not exceeding the sum to be fixed by the judge or justice of the court from which the appeal is taken, and which sum must be specified in the undertaking. A deposit of the amount of the judgment, including all costs appealed from, or of the value of the property including all costs in actions for the recovery of specific personal property, with the justice or judge, is equivalent to the filing of the undertaking; and in such cases the justice or judge must transmit the money to the clerk of the district court, to be by him paid out on the order of the court. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge from whom the appeal is taken, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given.

1887 R. S. Sec. 4842.

State, county and officers are not required to give undertaking: Sec. 3750.

Statutory form applicable to all undertakings: Sec. 3752.

Supersedeas, judgment, forcible entry and detainer, not stayed unless court specially directs: Sec. 3991.

Notice of filing exceptions to the sufficiency of sureties to an undertaking on appeal should be given to the adverse party. Under the facts of this case, held, that the appellant had sufficient time in which to have sureties justify or to file a new undertaking after notice in open court of filing exceptions.—*Holcomb v. Reed* (Idaho), 46 Pac. 1019.

When exception to the sufficiency of the sureties is made, they or other sureties must appear and justify within five days after the service of the notice excepting to the sureties, and upon notice to the adverse party, if they do not, the appeal will be dismissed.—*Davelin v. Post Falls Woolen Mills Co.* (Idaho), 44 Pac. 554.

The substitution for a surety who fails to justify of a new surety who merely signs the same bond without being mentioned in the body of the bond as a surety, or otherwise being made a party thereto, is void, and cannot be made effective by the superior court allowing the appellant to file a new undertaking; and the action of the court in refusing to dismiss the appeal will be annulled upon certiorari.—*Bennett v. Superior Court*, 113 Cal. 440, 44 Pac. 808.

When an appeal is taken from a justice's court, and a sufficient undertaking is given to stay execution, the effect is to transfer the entire record to the appellate court, and to cause the action to be retried in that court, as if originally brought therein. In such a case the judgment appealed from is completely annulled, and it is not thereafter available for any purpose.—*Bullard v. McArdle*, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176; *Numbers v. Rocky Mountain Bell Telephone Co* (Idaho), 63 Pac. 381.

Section 3688. On Filing Undertaking, Execution Stayed: If an execution be issued, on the filing of the undertaking staying proceedings, the justice or judge must, by order, direct the officer to stay all proceedings on the same. Such officer must, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

1887 R. S. Sec. 4843.

Section 3689. Miscellaneous Provisions on Trials: Upon an appeal on questions of law alone, the district court may review all orders affecting the judgment appealed from, and may set

aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial in the district court. When the action is tried anew on appeal, the trial must be conducted in all respects as trials in the district court. The provisions of this Code as to changing the place of trial, and all the provisions as to trial in the district court, are applicable to trials on appeal in the district court. For a failure to prosecute on appeal, or unnecessary delay in bringing it to a hearing, the district court, after notice, may order the appeal to be dismissed with costs; and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding twenty-five percent of the judgment appealed from. Judgments rendered in the district court on appeal have the same force and effect, and may be enforced in the same manner as judgments in actions commenced in the district court.

1887 R. S. Sec. 4844.

Changing place of trial: Sec. 3184 et seq.

Trial, generally: Secs. 3450 to 3495.

Judgments: Secs. 3495 to 3514.

Attorney's fees on appeal of action by laborer for wages: Sec. 3721.

Justices' courts, appeal to supreme court, from actions arising in, within what time: Sec. 3573.

Upon appeal upon questions of law alone, where there has been no trial of the issues of fact, but the ruling of the justice's court overruling the demurrer to the complaint is held erroneous, the superior court cannot try the case; but may remand the case, with directions to the justice court to sustain the demurrer, with leave of the plaintiff to amend, if so advised. In such cases the appeal goes up on a statement of the case, docket and papers required to be sent up. The justice is not required to send up the entire record and the superior court can only pass upon the questions of law presented, but upon reversal it has jurisdiction to make its judgment effectual by remanding the cause for further proceedings according to its

directions and may direct and control subsequent action in the justice's court. A certified copy of its judgment, including its directions to the justices' court is sufficient for the transmission of its judgment.

Where an appeal is taken upon questions of law and fact the entire record must be sent up and the superior court has jurisdiction to try the cause anew. —*Maxson v. Superior Court*, 124 Cal. 468, 57 Pac. 379.

If a justice's court has jurisdiction of the parties to a case before it, and of its subject matter, an appeal from the justice's court to a district court gives the appellate court jurisdiction of both. Hence, if new parties defendant are added on such appeal, and they entered an appearance, a dismissal, in the district court, as to the only party defendant in the justice's court, does not deprive the district court of jurisdiction of the case, or of the parties brought in.—*Hamner v. Ballantyne*, 16 Utah, 436, 52 Pac. 770, 67 Am. St. Rep. 643; *Holt v. Gridley et al.* (Idaho), 63 Pac. 188.

CHAPTER CLXIII.

GENERAL PROVISIONS RELATING TO PROBATE AND JUSTICES' COURTS.

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3690. Process issued to any part of county.

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Section.

3693. Disability of justice, another may attend.

3694. Security for costs.

3695. Costs.

3696. Provisions of Code applicable.

3697. Deposit in lieu of undertaking.

Section 3690. Process Issued to any Part of County:

Subpoenas out of any probate or justice's court, and final process on

any judgment recovered therein, may be issued to any part of the county.

1887 R. S. Sec. 4771.

Mesne and final process may be issued to any part of the county: Sec. 3010.

Section 3691. Blanks must be Filled: The summons, execution, and every other paper made or issued by a probate court or justice, except a subpoena, must be issued without a blank left to be filled by another, otherwise it is void.

1887 R. S. Sec. 4772.

Section 3692. Justice to Receive all Moneys Collected: Probate judges and justices of the peace must receive from the sheriffs or constables of their county, all moneys collected on any process or order issued from their courts respectively, and all moneys paid to them in their official capacity, and must pay the same over to the parties entitled or authorized to receive them, without delay.

1887 R. S. Sec. 4773.

Section 3693. Disability of Justice, Another may Attend: In case of the sickness or other disability, or necessary absence of a justice, on a return of a summons or at the time appointed for a trial, another justice of the same precinct or city may, at his request, attend in his behalf, and thereupon is vested with the power, for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of proceedings before the attending justice subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.

1887 R. S. Sec. 4774.

Section 3694. Security for Costs: Probate and justices' courts may in all cases require a deposit of money or an undertaking, as security for costs of court, before issuing a summons.

1887 R. S. Sec. 4775.

Section 3695. Costs: The prevailing party in probate and justices' courts is entitled to costs of the action and also of any proceedings taken by him in aid of an execution, issued upon any judgment recovered therein.

1887 R. S. Sec. 4776.

Section 3696. Provisions of Code Applicable: The probate courts in the exercise of their civil jurisdiction, and justices' courts, being courts of peculiar and limited jurisdiction, only those provisions of this Code which are, in their nature, applicable to the organization, powers, and course of proceedings in these courts, or which have been made applicable by special provisions in this Code, are applicable to these courts and the proceedings therein.

1887 R. S. Sec. 4777.

As to whether proceedings by complaint in intervention are applicable to justice court, see *Rossi v. Superior Court*, 114 Cal. 371, 46 Pac. 177.

Section 3697. Deposit in Lieu of Undertaking: In all civil cases arising in probate and justices' courts, where an undertaking is required by this Code, a deposit with the court of a sum of money equal to the amount of the required undertaking, may be received and held by the court in place of said undertaking.

1887 R. S. Sec. 4778.

TITLE XVIII.

MISCELLANEOUS PROVISIONS.

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Chap. CLXV. Offer of Defendant to Compromise.

Chap. CLXVI. Inspection of Writings.

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CHAPTER CLXIV.

PROCEEDINGS AGAINST JOINT DEBTORS.

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3699. Summons in that case. Requisites, how served.

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3700. Affidavit to accompany summons.

3701. Answer, when filed. Defense.

3702. What constitute the pleadings.

3703. Issues, how tried. Verdict.

Section 3698. Parties not Summoned may be After Judgment: When a judgment is recovered against one or more of several persons jointly indebted upon an obligation, by proceeding as provided in Section 3197, those who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons.

1887 R. S. Sec. 4860.

Joining persons severally liable upon instrument: Sec. 3171.

Summons served on one defendant out of several, plaintiff may proceed against him alone: Sec. 3197.

Judgment against some defendants, proceeding continuing against others: Sec. 3497.

Costs can not be recovered in more than one action when defendants are openly within the state: Sec. 3720.

Section 3699. Summons in that Case. Requisites, how Served: The summons, as provided in the last Section, must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner, and returnable within the same time as the original summons. It is not necessary to file a new complaint.

1887 R. S. Sec. 4861.

Section 3700. Affidavit to Accompany Summons: The summons must be accompanied by an affidavit of the plaintiff,

his agent, representative or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

1887 R. S. Sec. 4862.

Section 3701. Answer, when Filed. Defense: Upon such summons the defendant may answer within the time specified therein, denying the judgment or setting up any defense which may have arisen subsequently, except a discharge from liability by the statute of limitations; or he may deny his liability on the obligation upon which the judgment was recovered.

1887 R. S. Sec. 4863.

Section 3702. What Constitute the Pleadings: If the defendant in his answer, deny the judgment, or set up any defense which may have arisen subsequently, the summons with the affidavits annexed, and the answer constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons with the affidavit annexed, and the answer, constitute such written allegations.

1887 R. S. Sec. 4864.

Section 3703. Issues, how Tried. Verdict: The issues formed may be tried as in other cases, but when the defendant denies in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon.

1887 R. S. Sec. 4865.

CHAPTER CLXV.

OFFER OF DEFENDANT TO COMPROMISE.

Section.

3704. Offer of defendant to compromise.

Section 3704. Offer of Defendant to Compromise: The defendant in any action may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs accruing subsequently to the offer, but must pay the defendant's costs from the time of the offer.

1887 R. S. Sec. 4870.

Provision for offer to compromise in justice's court: Sec. 3658.

In actions for the recovery of money only a tender of amount due before ac-

tion, duly pleaded, avoids costs: Sec. 3728.

COMPROMISE, ADMISSIBILITY OF
OFFER OF SETTLEMENT IN EVIDENCE: Offers of settlement of a suit

not accepted are not admissible against the party making them on the trial of the action.—*Sebree v. Smith*, 2 Idaho, 329, 16 Pac. 915.

Offers of defendant to compromise.—*See Pence v. Sweeny*, 2 Idaho, 914, 28 Pac. 413.

CHAPTER CLXVI.

INSPECTION OF WRITINGS.

Section.

3705. Party may demand inspection and copy.

Section 3705. Party may Demand Inspection and Copy: Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of account in any book, or of any document, or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the book, document, or paper from being given in evidence; or, if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be and the court may also punish the party refusing, for a contempt. This Section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness.

1887 R. S. Sec. 4875.

Inspection of writing, not obliged to use as evidence after: Sec. 4433.

Proceedings to compel witness to produce books: Sec. 4454.

Inspection of public writings, any person may. Obtaining copy: Secs. 4409 and 4410.

NOTICE, PRACTICE: When documentary evidence which a party needs in the trial of a cause, is in the hands, or under the control of the opposite

party, before the latter can be required to produce it on the trial, he must have due notice thereof. When he had it in his possession in court at the trial notice at the time is sufficient; otherwise, to be effectual, it must be served upon him a sufficient length of time before the trial to enable him to produce it.—*Alvord v. United States*, 1 Idaho, 585.

As to power of court to order production of books and papers.—*Ex parte Clarke*, 126 Cal. 235, 58 Pac. 546.

CHAPTER CLXVII.

MOTIONS AND ORDERS.

Section.

3706. Order and motion defined.

3707. Motions and orders, where made.

3708. Notice of motion.

Section.

3709. Transfer of motions and orders to show cause.

3710. Order of payment of money, how enforced.

Section 3706. Order and Motion Defined: Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

1887 R. S. Sec. 4880.

Notice of motion: Sec. 3708.

Power of court to compel obedience

to orders of court or judge: Sec. 3013, Sub. 4.

Orders, repeated applications for prohibited: Secs. 3037, 3038.

Section 3707. Motions and Orders, where Made: Motions may be made in the county in which the action is pending,

or in any county in the same judicial district. Orders made out of court may be made by the judge of the court in any part of the State.

1887 R. S. Sec. 4881.

In case of vacancy or absence of judge, motion may be made and order

granted by any other district judge: Sec. 3028.

Section 3708. Notice of Motion: When a written notice of a motion is required by this Code, it must be given, unless a different time is prescribed, if the hearing is had in the same district in which the action is pending or the proceeding had, five days before the time appointed for the hearing; otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but the court or judge may prescribe a shorter time. Copies of all the moving papers, except records of the court and files in the action, must be served with the notice, or with an order to show cause. But no written notice of any motion affecting the pleadings or for judgment, or of any motion made during the progress of the trial shall be required.

1887 R. S. Sec. 4882.

WAIVER OF NOTICE OF MOTION: Voluntary appearance of attorney and participation in the argument of a motion, waives notice of such a motion.—Curtis v. Walling, 2 Idaho, 383, 18 Pac. 54.

Notice of motion is waived if the

party is in court at the time the motion is made, and, without objecting to the want of notice, proceeds to argue the question involved, and when it is decided against him takes a general exception to the ruling.—Herman v. Santee, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145.

Section 3709. Transfer of Motions and Orders to Show Cause: When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be continued or transferred by his order to some other judge.

1887 R. S. Sec. 4883.

Section 3710. Order of Payment of Money, how Enforced: Whenever an order for the payment of a sum of money is made by a court or judge pursuant to the provisions of this Code, it may be enforced by execution in the same manner as if it were a judgment.

1887 R. S. Sec. 4884.

CHAPTER CLXVIII

SERVICE OF PAPERS, NOTICE AND APPEARANCE.

Section.

3711. When and how served.

3712. Service by mail, when.

3713. Service by mail, how.

3714. Appearance. Notice after appearance.

Section.

3715. Service on non-residents.

3716. Not to apply to proceedings for contempt.

3717. Service by telegraph.

Section 3711. When and how Served: The service of notice or other paper may be personal, by delivery to the party or

attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, enclosed in an envelope, into the postoffice, directed to such attorney;

2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning, and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, enclosed in an envelope into the postoffice, directed to such party.

1887 R. S. Sec. 4889.

Provisions for service of notice where change of attorneys made: Sec. 3098.

Provisions of Sections 3711 to 3715 inclusive, do not apply to the service of summons or other process to bring a party into court: Sec. 3716.

Mandamus. Notice of application must be ten days: Sec. 3772.

Under Code of Civil Procedure, 685 (3711), containing the same provisions, sufficient service of a notice of appeal was not shown by the affidavit of the attorney making the same reciting that "affiant served a notice upon the attorney for respondent by leaving a true copy thereof at his office."—*Warner v. Teachenor*, 2 Idaho, 39, 2 Pac. 717.

Section 3712. Service by Mail, when: Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail.

1887 R. S. Sec. 4890.

Section 3713. Service by Mail, how: In case of service by mail the notice or other paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit, but if within a given number of days after such service a right may be exercised or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address: such extension, however, not to exceed thirty days in all.

1887 R. S. Sec. 4891.

Section 3714. Appearance. Notices After Appearance: A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned in the action for want of bail,

1887 R. S. Sec. 4892.

Admission of due service of notice of appeal is a waiver of irregular service, and, when a party voluntarily appears in court, he will be subject to the same jurisdiction as if brought in by regular process.—*Wilson v. Wilson* (Idaho), 57 Pac. 708.

A party who has appeared generally by demurrer can not afterwards raise the question of a want of service.—

Willman v. Friedman (Idaho), 38 Pac. 937.

After appearance in the action, the defendant is entitled to notice of motion for the appointment of a receiver in the action; and an order made by the judge after such appearance, without notice to the defendant, is without jurisdiction and void.—*Cummings v. Steele*, Judge (Idaho), 59 Pac. 15, cases cited.

Section 3715. Service on Non-Residents: When plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney resident of the State in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has such resident attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt. If there be no such resident attorney of record, service may be made upon the party.

1887 R. S. Sec. 4893.

Section 3716. Not to Apply to Proceeding for Contempt: The foregoing provisions of this Chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

1887 R. S. Sec. 4894.

Section 3717. Service by Telegraph: Any summons, writ, or order in any civil suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ or order, or paper so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner and with the same force and effect in all respects, as the original thereof might be if delivered to him, and the officer or person serving or executing the same, has the same authority, and is subject to the same liabilities, as if the copy were the original. The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof preserved in the telegraph office from which it was sent. In sending it, either the original or the certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph bears a seal, either private or official, it is not necessary for the operator, in sending the same, to telegraph a description of the seal, or any words or device thereon, but the same may be expressed in the telegraphic copy by the letters "L. S." or by the word "seal."

1887 R. S. Sec. 4895.

CHAPTER CLXIX.

COSTS.

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GENERAL RULES OF ALLOWANCE ON FINAL JUDGMENT.

Section 3718. Costs to Parties: Parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.

1887 R. S. Sec. 4900, last portion. First portion of this section relates to compensation of attorneys and is transferred to Section 3096.

Note: Attorney's fees when allowable to plaintiff under stipulations in written contracts are not properly costs and are treated generally in annotations under Section 3096.

Costs, mandamus proceedings, collection: Sec. 3779.

Eminent domain, costs: Sec. 3858.

Condemnation proceedings for right of way for development of mines, costs, tender, how affecting: Secs. 3870-3871.

Election contests, costs: Sec. 3811.

Insolvency proceedings, contested matters, costs: Sec. 3953.

Confession of judgment, costs on. District court: Sec. 3957. Probate and justice's court: Sec. 3958.

Mechanics' liens, costs and counsel fees: Sec. 3365.

Partition, costs and counsel fees: Secs. 3440 and 3438.

Probate matters. Attorney's fees: Sec. 4319. Costs as to homestead, etc.: Sec. 4131. Revocation of probate: Sec. 4022.

Change of venue, payment of costs before change of: Sec. 3186.

Court can not by rule impose tax or charge on proceedings: Sec. 3014.

Section 3719. When Allowed of Course to Plaintiff: Costs are allowed of course to the plaintiff, upon a judgment in his favor, in the following cases:

1. In an action for the recovery of real property;
2. In an action to recover the possession of personal property where the value of the property amounts to one hundred dollars or over; such value shall be determined by the jury, court, or referee, by whom the action is tried;
3. In an action for the recovery of money or damages, when plaintiff recovers one hundred dollars or over;
4. In a special proceeding;
5. In an action which involves the title or possession of real estate, or the legality of any tax, impost, assessment toll, or municipal fine.

1887 R. S. Sec. 4901.

Costs, not against defendant disclaiming title, real estate: Sec. 3380.

In an action upon a lost note, if no

tender of indemnity has been made before suit, the plaintiff is not entitled to costs unless the defendant has waived a tender, in which case the costs are

in the discretion of the court.—*Randolph v. Harris*, 28 Cal. 561, 87 Am. Dec. 139; *Richards v. Scott et al.* (Idaho), 65 Pac. 433.

Section 3720. Several Actions; Single Cause Costs in but One: When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other cause for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the parties proceeded against in the other actions were at the commencement of the previous action openly within this State, but the disbursements of the plaintiff must be allowed to him in each action.

1887 R. S. Sec. 4902.

Section 3721. Action for Wages, Attorney's Fee Allowed: Whenever a mechanic, artisan, miner, laborer, servant, or employee, shall have cause to bring suit for wages earned and due, according to the terms of his employment, and shall establish by the decision of the court or verdict of the jury, that the amount for which he has brought suit is justly due, and that a demand has been made in writing, at least fifteen days before suit was brought, for a sum not to exceed the amount so found due; then it shall be the duty of the court, before which the case shall be tried, to allow to the plaintiff a reasonable attorney's fee, in addition to the amount found due for wages, to be taxed as costs of suit. In a justice's court, such attorney's fee shall not be more than five dollars, and in the district court, not more than ten dollars, except in cases on appeal from justice's court, when the plaintiff may recover an attorney's fee not exceeding twenty-five dollars.

1899, 5th Ses. p. 394.

Section 3722. Defendant's Costs Allowed in Certain Cases: Costs must be allowed, of course, to the defendant upon a judgment in his favor in the actions mentioned in Section 3719, and in special proceedings.

1887 R. S. Sec. 4903.

Section 3723. Costs, when in Discretion of Court: In other actions than those mentioned in Section 3719, costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court, but no costs can be allowed in an action for the recovery of money or damages, when the plaintiff recovers less than one hundred dollars, nor in an action to recover the possession of personal property when the value of the property is less than one hundred dollars.

1887 R. S. Sec. 4904.

Richards v. Scott et al. (Idaho), 65 Pac. 433.

Section 3724. Several Defendants not United in Interest, Costs Severed: When there are several defendants in the actions mentioned in Section 3719, not united in interest, and making separate defenses by separate answers, and plaintiff fails to re-

cover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.

1887 R. S. Sec. 4905.

Section 3725. Costs of Appeal Discretionary in Certain Cases: In the following cases the costs of appeal are in the discretion of the court:

1. When a new trial is ordered;
2. When a judgment is modified. In all other cases the prevailing party shall recover costs, including his costs below when the appeal is to the district court.

1887 R. S. Sec. 4906.

Probate matters, on appeal to su-

preme court or district court execution may issue for: Sec. 4321.

RULES OF ALLOWANCE IN SPECIAL INSTANCES.

Section 3726. Referee's Fees: The fees of referees are five dollars to each for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensaton, and thereupon such rate shall be allowed.

1887 R. S. Sec. 4907.

Section 3727. Continuance, Costs Imposed as Condition of: When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

1887 R. S. Sec. 4908.

Section 3728. Costs when a Tender is Made: When in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for plaintiff, the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

1887 R. S. Sec. 4909.

Costs may also be avoided by offer to allow judgment: Sec. 3704.

Party has no right to make tender on his own behalf of amount due on mortgage, where he has no interest in the

mortgaged premises, or in making the tender. A creditor has a right to be informed on whose behalf a tender is made, when made by a stranger.—*Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571.

Section 3729. Costs in Action by or Against Administrator, etc.: In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be made chargeable only upon the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally for mismanagement or bad faith in the action or defense.

1887 R. S. Sec. 4910.

Costs, when administrator personally liable: Sec. 4213.

Section 3730. Costs on Review Other than by Appeal: When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.

1887 R. S. Sec. 4911.

TAXATION OF COSTS.

Section 3731. Memorandum of Costs. Taxation: The party in whose favor the judgment is rendered and who claims his costs, must within five days after the verdict or notice of the decision of the court referee, file with the clerk, and serve upon the adverse party or his attorney a copy of a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief, the items are correct and that the disbursements have been necessarily incurred in the action or proceeding.

A party dissatisfied with the costs claimed, may within five days after the service upon him of a copy of the memorandum, file and serve upon the adverse party or his attorney a notice of a motion to have the same taxed by the court in which judgment was rendered, or by the judge thereof at chambers.

1887 R. S. Sec. 4912, amended 1899, 5th Ses. p. 231; 1895, 3d Ses. p. 6.

Where special findings are made by the jury, they do not become the verdict in the case, as that term is used in Section 4912 of the Revised Statutes, as amended by the act of 1895, until they are adopted by the court.—*Peters v. Leftlany* (Idaho), 55 Pac. 857.

COSTS, WAIVER OF RIGHT, FAILURE TO FILE MEMORANDUM: When a party entitled to costs fails to file his memorandum thereof within the time prescribed by Section 4912 of the Rev. St. he thereby waives his right to costs and the clerk has no right thereafter to insert them in the record of the judgment. In such a case the fact that the costs did not appear in the record of judgment does not constitute any irregularity.—*Cantwell v. McPherson*, 2 Idaho, 1044, 29 Pac. 102.

A memorandum of costs in such a case is filed and served in time if done within five days after the court has announced that it accepts and adopts the findings of the jury.—*Peters v. Leftlany* (Idaho), 55 Pac. 857.

On a motion to tax costs, a memorandum of costs, verified and filed as provided by Section 4912, Rev. St. and amendments thereto, makes a prima facie case for the party entitled to the

costs, and in order to justify a taxation thereof by the judge, the dissatisfied party must overcome by proof the prima facie case made by such memorandum.—*Elliott v. Collins* (Idaho), 53 Pac. 452.

A motion to retax costs, which is unsupported by evidence, should be denied as to all items of a cost bill that do not appear, from the cost bill itself, to be illegal.—*Theissen v. Riggs* (Idaho), 51 Pac. 107.

TAXATION OF COSTS: When the items of a cost bill are denied by the affidavit of the party against whom such costs are claimed, the onus of proof is on the party claiming the costs.—*Griffith v. Montandon* (Idaho), 35 Pac. 704.

TAXATION OF COSTS, AGREEMENT AS TO AMOUNT: Defendant moved the court for a retaxation of the costs claimed by plaintiff, agreeing that if the motion should be allowed, he would pay the damages and costs found due on retaxation, to which proposition plaintiff consented. The court retaxed the costs and struck out \$123.77. The defendant immediately paid the judgment and costs, less the amount so struck out. Plaintiff thereafter filed a demand for a writ of execution for the balance of said costs, disallowed by the

court. The court refused to issue the writ. Held, that the writ was properly refused; the plaintiff was bound by his agreement in accepting defendant's proposition to pay the judgment found due by the court.—*Bowen v. Weatherman*, 2 Idaho, 1184, 31 Pac. 814.

Plaintiff having obtained judgment against the defendant, filed his cost bill. Within five days thereafter, the defendant served notice of motion to strike the plaintiff's cost bill from the files, on the ground that it was not itemized as required by law, and, in the event of such motion being overruled, that the costs be taxed, which motion was supported by affidavit. The trial court overruled said motion. Defendant appealed, and on appeal plaintiff contended that the trial court had not acted on the motion to tax costs. Held, that the trial court had overruled the motion to tax costs.—*Berry v. B. Min. Co.* (Idaho), 51 Pac. 746.

ORDERS AFTER JUDGMENT, APPEAL, PRACTICE: An order refusing to retax costs, if made after the rendition and entry of final judgment, can only be reviewed on an appeal from the order.—*Emery v. Langley*, 1 Idaho, 694.

Practice, papers necessary on appeal from order taxing costs.—*McConnell v. McCormick*, 2 Idaho, 957, 28 Pac. 421.

RECORD, EVIDENCE: When the record contains the statement that it contains all the evidence considered on the hearing of a motion to tax costs, there is no presumption that the judge took into consideration certain facts, of which he had actual knowledge, in the determination of such motion.—*Griffith v. Montandon* (Idaho), 35 Pac. 704.

Section 4912, Rev. St. restricts the recovery of costs to those necessarily incurred.—*Griffith v. Montandon* (Idaho), 35 Pac. 704.

COSTS, EXPENSES OF SHERIFF, REMOVAL ATTACHED PROPERTY: Where the statutes provide that the sheriff shall be allowed for his trouble and expenses in taking and keeping possession of and preserving property under attachment, etc., such sum as the court may order, provided no more than \$3.00 per day be allowed the keeper. Where an expense of \$688.20 was incurred by the sheriff without the order of the court for the removal of lumber from the mill of defendants, no necessity for the removal appearing, held, that such charge should be disallowed.—*McConnell v. McCormick*, 2 Idaho, 957, 28 Pac. 421.

TAXATION OF COSTS, EXPERTS: The expenses by a party to a suit in the employment of experts are not taxable as costs.

SAME, STENOGRAPHERS' FEES:

To entitle a party to tax as costs the fees or charges of a stenographer, it must appear that the same was incurred under the provisions of the statute applicable thereto.—*McDonald v. Burke*, 2 Idaho, 995, 28 Pac. 440.

WITNESS WHO DOES NOT TESTIFY, EXPENSE OF: If a party procures the attendance of a witness who does not testify, the expense of such witness is not chargeable to the losing party unless sufficient reason is shown that would legally excuse his failure to testify.—*Griffith v. Montandon* (Idaho), 35 Pac. 704.

FEES OF WITNESSES: If an officer or witness expressly says he makes no charge for services rendered, the successful party can not tax against the losing party the fees which such persons would have been entitled to if they had charged therefor.—*Griffith v. Montandon* (Idaho), 35 Pac. 704.

COSTS ON APPEAL: Where a party unnecessarily multiplies the costs excessively, the court will protect the adverse party from payment of such excess.—*Sommercamp v. Catlow*, 1 Idaho, 716.

Appellant, although successful on appeal, to recover all the cost of procuring and printing transcript on appeal must comply with the rules of this court in regard to making and printing the transcript.—*Thiesson v. Riggs* (Idaho), 51 Pac. 107.

FEES FOR CERTIFYING TO TRANSCRIPT ON APPEAL: The clerk of the district court is entitled to legal fees for the copy and certifying to transcript, even though the copy was furnished to him.—*Potter v. Talkington* (Idaho), 49 Pac. 14.

Certification of transcript, costs on refusal.—*Lydon v. Goddard* (Idaho), 51 Pac. 459.

Defendant's attorney having served notice of withdrawal from case, on request and refusal by him to certify transcript creates no liability for costs.—*Bonner v. Powell* (Idaho), 61 Pac. 138.

Where an order to show cause why an injunction should not issue is apparently heard by consent or agreement of parties, without any attempt to comply with the provisions of the statute in relation thereto, the prevailing party is entitled to recover disbursements actually and necessarily made in preparing for such hearing, including the cost of procuring witnesses; and, where upon an appeal from an order made upon such hearing, an appeal is taken, the prevailing party being the appellant he is entitled to tax in his costs the amount paid by him to procure a copy of the evidence from the court stenographer.—*Raft River Land and Cattle Co. v. Langford* (Idaho), 51 Pac. 1027.

Court has legal discretion to allow the amendment of a cost bill and the affidavit accompanying it and the amendment relates back to the time of filing the original. If the original affidavit to a cost bill be a nullity, the defendant should treat it as such, and take proper steps to set it aside. An affidavit to a bill of costs can be made by the attorney of the prevailing party.—*Burnham v. Hays*, 3 Cal. 115, 58 Am. Dec. 389.

Error of court in refusing to allow party costs can not be reviewed on an appeal from an order denying a new

trial.—*Stevenson v. Smith*; 28 Cal. 102, 87 Am. Dec. 107.

Correctness of cost bill can not be reviewed upon appeal when there is no statement or bill of exceptions, and the appeal is simply from the judgment, which shows no irregularity in the allowance of costs.

Motion to strike out cost bill, made long after the appeal is perfected, can not be reviewed upon an appeal from the judgment, as the cost bill is no part of the judgment roll.—*Howard v. Richards*, 2 Nev. 128, 90 Am. Dec. 520; *Stickney v. Berry* (Idaho), 62 Pac. 924.

Section 3732. Costs on Appeal, how Claimed and Recovered:

Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must within thirty days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by the preceding Section, and thereafter he may have an execution therefor as upon a judgment.

1887 R. S. Sec. 4913.

Section 3733. Interest and Costs Included by Clerk in Judgment:

The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose and must make a similar insertion of the costs in the copies and docket of the judgment.

1887 R. S. Sec. 4914.

SECURITY FOR COSTS.

Section 3734. Security for Costs: When the plaintiff in an action resides out of the State, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action must be stayed until an undertaking, executed by two or more persons, is filed with the clerk to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the court or judge upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed.

1887 R. S. Sec. 4915.

Section 3735. Security not Given, Action Dismissed:

After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon

proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed.

1887 R. S. Sec. 4916.

PAYMENT WHEN AGAINST STATE OR COUNTY.

Section 3736. Costs when State is a Party: When the State is a party and costs are awarded against it, they must be paid out of the State treasury, and the State auditor shall draw his warrant therefor on the general fund.

1887 R. S. Sec. 4917.

In no event could this court render judgment against the territory for costs, there being no mode of enforcing it, or

process by which it could be made effective.—*Beachy v. Lamkin*, 1 Idaho, 50.

Section 3737. Costs when County is a Party: When a county is a party and costs are awarded against it, they must be paid out of the county treasury.

1887 R. S. Sec. 4918.

County not to give security for costs: Sec. 3750.

taxes, although the defendant recovers, the judgment should be general without costs.—*People v. Moore*, 1 Idaho, 662.

SUIT FOR TAXES: In a suit for

CHAPTER CLXX.

GENERAL PROVISIONS.

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RELATING TO PLEADINGS, PROCEEDINGS, AND ACTIONS.

Section 3738. Lost Papers, how Supplied: If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.

1887 R. S. Sec. 4923.

For General provisions relating to power of court and control over pro-

ceedings therein: Chap. CXXI, Secs. 3011 to 3026.

Section 3739. Papers Without Title of Action, Valid: An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligently refer to such action or proceeding.

1887 R. S. Sec. 4924.

Where a mining company appeals to the county board of equalization from an assessment of taxes levied against it and the board orders a reduction in the assessment and from this order appeal is taken by a tax payer to the district court resulting in a reversal of the action of the county board, a writ of error will lie at the instance of the mining company to review the action of the

district court and the fact that the name of the mining company did not appear in the title of the original notice of appeal or in the judgment of the district court is not prejudicial to the company's rights to a writ of error under Code of Civil Procedure, Section 711 being identical with above section.—*Van Camp v. Board of Commissioners of Custer County*, 2 Idaho, 332 Pac. 721.

Section 3740. Successive Actions on 'Same Contract:

Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

1887 R. S. Sec. 4925.

Section 3741. Consolidation of Several Actions:

Whenever two or more actions are pending at one time between the same parties and in the same court, upon cause of action which might have been joined, the court may order the actions to be consolidated.

1887 R. S. Sec. 4926.

CONSOLIDATION OF ACTIONS, CONSENT OF PARTIES: Error can not be predicated on the action of the court below in consolidating for the purposes of the trial two actions where

it appears that both parties consent to the consolidation; that the defendants were the same in both actions and that the same amounts were involved.—*Rosenthal v. Ives*, 2 Idaho, 244, 12 Pac. 904.

Section 3742. Actions, when Deemed Pending: An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

1887 R. S. Sec. 4927.

RES JUDICATA, RIGHT OF APPEAL: While the party against whom a judgment has been entered retains the right to appeal therefrom, it can not be admitted in evidence against him as a bar, under the statute declaring that an action shall be deemed pending from the time of commencement until its final

determination upon appeal, or until the time for appeal has elapsed, unless the judgment is sooner satisfied.—*Naftzger v. Gregg*, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23 and note. But is ground for continuance of the second until final determination of the former action.—*Brow v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314.

Section 3743. Actions to Determine Adverse Claims and by Sureties: An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as a surety.

1887 R. S. Sec. 4928.

Actions to determine adverse claims to real property: Sec. 3379.

The action provided by this section is an action at law, and triable in the ordinary course of law by a jury, unless a jury be waived.—*County of Ada v. Bullen Bridge Co. (Idaho)*, 47 Pac. 818; *Ada County v. First Nat. Bank of Idaho (Idaho)*, 47 Pac. 1098.

The provisions of this section provide an adequate remedy against the delay of persons to bring suit to recover on county warrants held by them, and which the county claims were issued without authority of law, as the county can compel the holders of such warrants to wage the claims on the same or to forever abandon them. An equitable action can not be maintained to cancel

such warrants.—County of Ada v. Bullen Bridge co. 47 Pac. 818 cases cited; Ada county v. First Nat. Bank of Idaho (Idaho), 47 Pac. 1098.

Section 3744. Time may be Extended: When an act to be done, as provided in this Code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements, or of bills of exceptions, or of amendments thereto, or to the service of notices, other than of appeal, the time allowed by this Code may be extended, upon good cause shown, by the court in which the action is pending, or the judge thereof.

1887 R. S. Sec. 4932.

RELATING TO COURT OFFICERS.

Section 3745. Testimony, when Taken by Clerk: On the trial of an action in a court of record, if there is no short-hand reporter of the court in attendance, the court may require the clerk to take down the testimony in writing.

1887 R. S. Sec. 4929.

Section 3746. Clerk must Keep a Register of Actions: The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

1887 R. S. Sec. 4930.

bitration: Sec. 3878.

Entry of stipulation to submit to arbitration:

Entry of award: Sec. 3881.

Section 3747. Two Referees may Act Alone: When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all.

1887 R. S. Sec. 4931.

RELATING TO UNDERTAKINGS AND SURETIES.

Section 3748. Actions Against Sheriff for Official Acts: If an action is brought against a sheriff for an act done by virtue of his office, and he gives written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein is conclusive evidence of his right to recover against such sureties; and the court, or judge in vacation, may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

1887 R. S. Sec. 4933.

Statutory provision making judgment in action against sheriff conclusive against his indemnifier, when the latter has been notified of the action, is founded on the principle that the action is, in substance, against the indemnifier, and that he has in that action an opportunity to make any defense that may exist. Where, therefore, the indemnifier has been notified of such action, he cannot maintain a bill in equity to set aside the judgment obtained therein—Dutil v. Pacheco, 21 Cal. 438, 82 Am. Dec. 749.

portunity to make any defense that may exist. Where, therefore, the indemnifier has been notified of such action, he cannot maintain a bill in equity to set aside the judgment obtained therein—Dutil v. Pacheco, 21 Cal. 438, 82 Am. Dec. 749.

Section 3749. Undertakings Mentioned, Requisites of: In all cases where an undertaking, with sureties, is required by the provisions of this Code, the officer taking the same, must require

the sureties to accompany it with an affidavit that they are each residents and householders or freeholders within the State, and each are worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking exceeds two thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties.

1887 R. S. Sec. 4934.

Section 3750. State not Required to Give Bonds:

In any civil action or proceeding wherein the State or the people of the State is a party plaintiff, or any State officer, in his official capacity, or on behalf of the State or any county, or city, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the State; or the people thereof, or any officer thereof, or of any county, or city; but on complying with the other provisions of this Code, the State, or the people thereof, or any State officer acting in his official capacity, or any county or city, have the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this Code.

1887 R. S. Sec. 4935.

Section 3751. Surety, Appeal Bond when Substituted to Rights of Creditor:

Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgments in all respects as if he had recovered the same.

1887 R. S. Sec. 4936.

Section 3752. Statutory form of Undertaking:

Whenever a party to any action or proceeding desires to give an undertaking provided to be given by law, it shall be sufficient if the sureties sign an undertaking indicating that they are thereby bound to the obligations of the statute requiring the undertaking to be given.

Such underaking may be in form as follows:

(Title of Court).

(Title of Cause).

Whereas, the desires to give an undertaking for (state what).....now therefore, we the undersigned sureties, do hereby obligate ourselves jointly and severally, to (name who).....under said statutory obligations in the sum of.....dollars.

The sureties so signing such undertaking are bound to the full statutory obligations of the statute requiring the undertaking.

1899, 5th Ses. p. 235; 1895, 3rd Ses. p. 18.

Section 3753. Proceedings to Relieve Sureties : The surety or the representative of any surety, upon the bond of any trustee, committee, guardian, assignee, receiver, executor, or administrator, or other fiduciary may apply by petition to the court wherein said bond is directed to be filed or which may have jurisdiction of such trustee, committee, guardian, assignee, receiver, executor or administrator, praying to be relieved from further liability as such surety for the acts or omissions of the trustee, committee, guardian, assignee, receiver, executor or administrator, or other fiduciary, which may occur after the date of the order relieving such surety to be granted as herein provided for and to require such trustee, committee, guardian, assignee, receiver, executor or administrator, or other fiduciary, to show cause why he should not account and said surety be relieved from such further liability as aforesaid and said principal be required to give a new bond; and thereupon, upon filing of said petition, said court shall issue such order returnable at such time and place and to be served in such manner as said court shall direct and may restrain such trustee, committee, guardian, assignee, receiver, executor or administrator or other fiduciary from acting except in such manner as it may direct to preserve the trust estate; and upon the return of such order to show cause if the principal in the bond account in due form of law and file a new bond duly approved, then said court must make an order releasing said surety filing the petition as aforesaid, from liability upon the bond of any subsequent act or default of the principal; and in default of said principal thus accounting and filing such new bond said court shall make an order directing such trustee, committee, guardian, assignee, receiver, executor or administrator or fiduciary to account in due form of law within thirty days, and that if the trust fund or estate shall be found or made good and paid over or properly secured such surety shall be discharged from any and all further liability as such for the subsequent acts or omissions of the trustee, committee, guardian, assignee, receiver, executor or administrator or fiduciary, after the date of such surety being so relieved or discharged and discharging such trustee, committee, guardian, assignee, receiver, executor or administrator, or fiduciary.

1899, 5th Ses. p. 338, Sec. 4.

Section 3754. Sureties Agreement to Deposit Money:

It shall be lawful for any party of whom a bond, undertaking, or other obligation is required, to agree with his surety or sureties for the deposit of any or all moneys and assets for which such surety or sureties are or may be held responsible, with a bank, savings bank, safe, deposit or trust company, authorized by law to do business as such, or other depository approved by the court, or a judge thereof, if such deposit is otherwise proper, for the safe keeping thereof, and in such manner as to prevent the withdrawal of such moneys and assets or any part thereof, without the written consent of such surety or sureties or an order of the court, or a judge thereof, made on such notice to such surety or sureties as such court or judge may direct.

1899, 5th Ses. p. 339, Sec. 5.

Section 3755. Sureties Reimbursement for Guaranty Premium: Any receiver, assignee, guardian, trustee, committee, executor, administrator or curator, or other fiduciary, required by law or the order of any court or judge, to give a bond or other obligation as such, may include as a part of the lawful expense of executing his trust, such reasonable sum paid a company authorized under the laws of this State so to do, for becoming his surety on such bond as may be allowed by the court in which, or a judge before whom, he is required to account, not exceeding one per centum per annum on the amount of such bond; and in all actions and proceedings a party entitled to recover disbursements therein shall be allowed and may tax and recover such sum paid such company for executing any bond, recognizance, undertaking, stipulation, or other obligation therein not exceeding, however, one per cent. on the amount of the liability upon such bond, recognizance, undertaking, stipulation, or other obligation during each year the same has been in force.

1899, 5th Ses. p. 339, Sec. 6.

Section 3756. Official Notices, Rate to be Charged for Publication: The rate to be charged for all official notices required to be published in any newspaper in this State by any village, city, or county official or other person shall be one dollar per folio, "straight matter," nonpareil type, or its equivalent, for first insertion, and fifty cents per folio for each subsequent insertion, and for table or figure matter one dollar and fifty cents per folio for first insertion, and seventy-five cents for each subsequent insertion, nonpareil type or its equivalent; one inch single column measure to be considered a folio; fractional folios to be charged for pro rata: *Provided*, No charge shall be made for less than one folio in any case.

1901, 6th Ses. p. 157, Sec. 1.

TITLE XIX.

SPECIAL PROCEEDINGS OF A CIVIL NATURE.

- Chap. CLXXI. Writ of Review.
- Chap. CLXXII. Writ of Mandate.
- Chap. CLXXIII. Writ of Prohibition.
- Chap. CLXXIV. Miscellaneous Provisions Relating to Special Writs.
- Chap. CLXXV. Adjudication of Water Rights.
- Chap. CLXXVI. Contesting Elections.
- Chap. CLXXVII. Contempts.
- Chap. CLXXVIII. Voluntary Dissolution of Corporations.
- Chap. CLXXIX. Eminent Domain.
- Chap. CLXXX. Change of Names.
- Chap. CLXXXI. Arbitrations.
- Chap. CLXXXII. Sole Traders.
- Chap. CLXXXIII. Proceedings in Insolvency.
- Chap. CLXXXIV. Summary Proceedings.

CHAPTER CLXXI.

WRIT OF REVIEW.

Section.

3757. Certiorari defined.

3758. When and by what courts granted.

3759. Application for, how made.

3760. Writ directed to inferior tribunal, etc.

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3763. Service of writ.

HEARING AND JUDGMENT.

3764. Review under writ, extent of.

3765. Return perfected, hearing and judgment.

3766. Copy of judgment must be sent to inferior tribunal.

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JURISDICTION, APPLICATION AND SERVICE.

Section 3757. Certiorari Defined: The writ of certiorari may be denominated the writ of review.

1887 R. S. Sec. 4961.

Certiorari and writ of review as used in the statute, constitution, and decisions

of the court and in the annotations herein are synonymous terms.—See *Al-deman v. Pierce* (Idaho), 55 Pac. 658.

Section 3758. When and by what Courts Granted:

A writ of review may be granted by the supreme court, or any district court, when an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court any plain, speedy and adequate remedy.

1887 R. S. Sec. 4962. Amended by commission to comply with Const. Art. V., Secs. 9 and 20.

Parties designated as plaintiff and defendant: Sec. 3285.

Proceedings had at chambers: Sec. 3287.

General rules of practice in district court applicable when not inconsistent: Sec. 3288.

Section 3028 gives a district judge at chambers jurisdiction to issue writ of review.—*Gans v. Steele* (Idaho), 61 Pac. 286.

The law does not confine the issuance of writs of review to courts of record, but that writ may issue to any inferior tribunal, board or officer exercising judicial functions upon proper showing in cases where there is no plain and speedy remedy.—*Gans v. Steele* (Idaho), 61 Pac. 286.

INTERLOCUTORY ORDERS: A writ of review cannot be granted to review the action of the court in denying the application for a change of venue, inasmuch as it is not a final order, and there is a plain, speedy and adequate remedy by appeal.—*State ex rel. McNamee v. Goode* (Idaho), 44 Pac. 640.

SAME, WHEN WRIT WILL LIE: Certiorari will not lie while the case is pending on a motion for a new trial until such motion has been finally disposed of in the inferior court.—*People ex rel. Huston v. Lindsay*, 1 Idaho, 394.

The statute does not provide an ap-

peal from an order of the probate court made in a proceeding supplemental to execution, and the only means of reviewing such order is by writ of review.—*Gans v. Steele* (Idaho), 61 Pac. 286.

ORDER APPOINTING RECEIVER:

Certiorari lies to annul an order appointing a receiver which was made on ex parte application after appearance of the defendant in the action.—*Cummins v. Steele*, Judge (Idaho), 59 Pac. 15.

SAME, CERTIORARI, WHEN LIES:

Certiorari will lie to review an order appointing a receiver, so as to determine, from the case as presented to the lower court, whether jurisdiction existed in such court, in the particular case made, to appoint a receiver.—*Sweeny v. Mayhew* (Idaho), 56 Pac. 85.

SAME: Plaintiff applied for appointment of receiver. Defendants filed their sworn answer, denying every equity and material allegation set forth in the complaint. On the hearing of the application the pleadings, the affidavit of plaintiff and one witness in his behalf, and the affidavits of three witnesses on behalf of the defendants, were considered by the district judge. It was not alleged or proven that the defendants were insolvent, or unable to respond to the plaintiff in damages. Held, that under such showing the order made by the district judge was without authority and should be annulled on certiorari.

—Sweeny v. Mayhew, Judge (Idaho), 56 Pac. 85.

NEW TRIAL. A bill of review will not lie to obtain a new trial where the party seeking such relief has been guilty of any laches or blunders by which he lost his rights in the original action.—McMillan v. Wooley (Idaho), 51 Pac. 1029.

ACTION OF COUNTY COMMISSIONERS. Writ of review does not lie from an action of a board of county commissioners, the statute having provided a speedy and adequate remedy by appeal.—Rogers v. Hayes et al. County Commissioners (Idaho), 32 Pac. 259.

ACTION OF CITY COUNCIL: Certiorari, denominated "writ of review" by the Idaho Code, will not lie to review the action of a city council in letting a contract to pave a street.—Adleman v. Pierce (Idaho), 55 Pac. 658.

CERTORARI: Whether a court has jurisdiction must be determined from the record taken as a whole.—Wulff v. Superior Court, 110 Cal. 215, 42 Pac. 638, 52 Am. St. Rep. 78.

An order of a court of probate depriving a guardian of the custody of moneys of his ward and directing that they be withdrawn from a bank in which they are on deposit, only when authorized by the court, is in excess of its jurisdiction, and may, therefore, be vacated on certiorari.—De Greayer v. Superior Court, 117 Cal. 640, 49 Pac. 983, 59 Am. St. Rep. 220.

The writ of certiorari may be issued by the supreme court to bring up for review, upon habeas corpus, the proceedings of the district court relating to the conviction and sentence of the prisoner for alleged contempt of court.—In re McKnight, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451.

Certiorari does not lie to review the action of an inferior board or tribunal in the exercise of purely legislative functions not judicial in character.—Wulzen v. Board of Supervisors, 101 Cal. 15 35 Pac. 353, 40 Am. St. Rep. 17 and extended note as to questions reviewable on certiorari. See also note 10 L. R. A. 248; Gans v. Steele, Judge (Idaho), 61 Pac. 286.

Section 3759. Application for, how Made: The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

1887 R. S. Sec. 4963.

Actions to be brought by real party in interest: Sec. 3155.

PETITION: The petition for writ of review is the complaint, and must be made on affidavit. The verification may be made by the attorney for the petitioner, if such attorney knows all the facts set up in the petition and so states in the affidavit.—Madison v. Piper, District Judge (Idaho), 53 Pac. 395.

Application and affidavit were presented to the district judge at chambers for writ of review. Writ was issued on November 21, 1889. Application was filed December 6, 1889. Held, sufficient, as there is nothing in the statute requiring the application to be filed before the writ is granted.—Gans v. Steele (Idaho), 61 Pac. 286.

WRIT OF REVIEW, PARTIES: To entitle a petitioner to a writ of review, he must be a party to the suit or matter in controversy.—Gold Hunter Mining Co. v. Holleman, 2 Idaho, 839, 28 Pac. 413.

SAME, INTERVENOR: An intervenor is entitled to a writ of review, equally with the original parties to the

suit.—Gold Hunter Mining Co. v. Holleman, 2 Idaho, 839, 28 Pac. 413.

PARTY BENEFICIALLY INTERESTED: Under the provisions of Section 4963, Rev. St. the application for a writ of review must be made by the party beneficially interested.—Madison v. Piper, District Judge (Idaho), 53 Pac. 395.

SAME, INSOLVENT DEBTOR: An insolvent, against whom an order is made, is the party beneficially interested in this case, and may make application for a writ of review, for the purpose of reviewing an order which the judge had no jurisdiction to make.—Madison v. Piper, District Judge (Idaho), 53 Pac. 395.

CERTIORARI BY CITIZEN AND TAX PAYER, REVIEWING OF TAX BOARDS: Every citizen and tax payer has the right to bring a proper suit to determine whether any board or officer having any authority connected with the levy and assessment of taxes has performed his duties as the law requires.—Orr v. State Board of Equalization, 2 Idaho, 923, 28 Pac. 416.

Section 3760. Writ Directed to Inferior Tribunal, etc.: The writ may be directed to the inferior tribunal, board or

officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.

1887 R. S. Sec. 4964.

Section 3761. Contents of Writ: The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed.

1887 R. S. Sec. 4965.

A writ issued, defective upon its face, does not affect the jurisdiction of the judge, and such defect must be reached by demurrer or motion to quash.—*Gans v. Steele* (Idaho), 61 Pac. 286.

CERTIORARI, EXTRINSIC EVIDENCE: Upon certiorari, if it becomes necessary for the court of review to be put in possession of facts upon which the court below acted and which are not technically of record, the lower

court may be required to certify such facts in its return to the writ, and a statement so made would then become a part of the record. Evidence dehors the record and contradicting it cannot be received in proceedings in certiorari for the purpose of proving that a statement made in return or paper appearing by the record is false.—*Los Angeles v. Young*, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234.

Section 3762. Proceedings in Interior Court, Stay of: If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted in the sound discretion of the court, but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed.

1887 R. S. Sec. 4966.

Section 3763. Service of Writ: The writ must be served in the same manner as a summons in civil action except when otherwise expressly directed by the court.

1887 R. S. Sec. 4967.

Manner of service of summons: Sec. 3193 et seq.

HEARING AND JUDGMENT.

Section 3764. Review under Writ, Extent of: The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

1887 R. S. Sec. 4968.

Section 3765. Return Perfected. Hearing and Judgment: If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming, or annulling, or modifying the proceedings below.

1887 R. S. Sec. 4969.

Costs and collection of: Sec. 3730.

Section 3766. Copy of Judgment must be Sent to Inferior Tribunal: A copy of the judgment signed by the clerk, must be transmitted to the inferior tribunal, board or officer having the custody of the record or proceedings certified up.

1887 R. S. Sec. 4970.

Section 3767. Judgment Roll: A copy of the judgment signed by the clerk, entered upon or attached to the writ and return, constitute the judgment roll.

1887 R. S. Sec. 4971.

CHAPTER CLXXII.

WRIT OF MANDATE.

Section.

DEFINITION, JURISDICTION AND APPLICATION FOR.

3768. Mandamus defined.

3769. When and by what court issued.

3770. When and upon what to issue.

3771. Writ either alternative or peremptory.

3772. Application without notice, alternative writ, otherwise peremptory.

ANSWER, HEARING, TRIAL OF FACTS.

3773. Adverse party may answer under oath.

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3774. Upon question of fact, court may order jury trial.

3775. Applicant may demur to answer or countervail by proof.

3776. Motion for new trial, where made.

3777. Transmission of verdict, argument of application.

3778. Proceedings when question of law alone involved.

JUDGMENT AND ENFORCEMENT.

3779. Judgment, damages, costs, peremptory mandate.

3780. Service of writ.

3781. Penalty for disobedience of writ.

DEFINITION, JURISDICTION, AND APPLICATION FOR.

Section 3768. Mandamus Defined: The writ of mandamus may be denominated a writ of mandate.

1887 R. S. Sec. 4976.

Writ of prohibition is the counter part of mandamus and is used to arrest

the proceedings of a corporation, board, etc., where proceedings are without or in excess of jurisdiction: Sec. 3782.

Section 3769. When and by what Court Issued: It may be issued by the supreme court or any district court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and the enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

1887 R. S. Sec. 4977. Amended by commission to comply with Const. Art. V, Secs. 9 and 20.

Returnable when may be made: Sec. 3788.

Parties designated as plaintiff and defendant: Sec. 3285.

Proceedings had at chambers: Sec. 3287.

General rules of practice in district court applicable when not inconsistent: Sec. 3288.

District courts also have power to issue affirmative injunctions to secure

restoration of real property when ousted by force, stealth, etc., which in some manner partake of the nature of mandamus: Sec. 3284, Sub. 6.

WHAT COURT MAY ISSUE: The writ must be applied for, in the first instance, from the district court, unless there appears some reason which renders it indispensable that application should be made directly to the supreme court.—Wright v. Kelley (Idaho), 43 Pac. 565.

Mandamus cannot issue to control the discretion of officers unless some abuse

thereof is shown.—*State v. Bickards*, 16 Mont. 145, 40 Pac. 210, 50 Am. St. Rep. 476 and note. See also notes 3 L. R. A. 316; 3 L. R. A. 777; *Perry v. Salt Lake City* (Utah), 11 L. R. A. 446.

MANDAMUS WILL SOMETIMES ISSUE TO CONTROL A DISCRETION: It properly issues to correct an abuse of discretion, if the case is otherwise proper. It is not universally true that this writ will not issue to control judicial action, or to compel a tribunal to whom the examination of a matter is intrusted to act in a particular way. Mandamus may properly issue to compel an officer to act in a particular manner, though, in the exercise of a discretion conferred on him, he has determined not to so act, if, from an examination of the law, the court is of the opinion that the law did not intend his action to be final, and further, that there is no other "plain, speedy, and adequate remedy."—*Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249 and note.

Mandamus will lie to compel the district court to vacate an order striking the name of an attorney from the roll and to restore the attorney.—*People v. Turner*, 1 Cal. 143, 52 Am. Dec. 295. To compel a sheriff to enforce an order of restitution for the possession of land,

even though third parties have entered pending the litigation and appeal.—*Quan Wo Chung Co. v. Laumeister*, 83 Cal. 384, 23 Pac. 320, 17 Am. St. Rep. 261; *Fremont v. Crippen, Sheriff*, 10 Cal. 212, 70 Am. Dec. 711 and note. To compel the sheriff to execute a deed to the redemptioner.—*McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655. To compel trustees to admit children entitled thereto to public schools.—*State v. Duffy*, 7 Nev. 342, 8 Am. Rep. 713. Under particular facts to compel a governor to cause a bill to be authenticated as a statute.—*Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432. To reinstate member of unincorporated association wrongfully expelled.—*Otto v. Journeyman Tailors' P. & B. U.* 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156.

When mandamus will issue to an inferior court: See note 3 L. R. A. 476.

MANDAMUS, LIMITATIONS: A proceeding in mandamus between private parties to enforce a monied obligation, where there is no statutory provision giving it a different character, is generally considered an action at law, in which the ordinary rules of practice, including the statutes of limitations, apply.—*Barnes v. Glide*, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153 and note.

Section 3770. When and upon what to Issue: The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested.

1887 R. S. Sec. 4978.

WHEN REMEDY AT LAW: Writ of mandamus will not issue where there is a plain, speedy and adequate remedy at law.—*Wright v. Kelly* (Idaho), 43 Pac. 565.

CONSTITUTIONALITY NOT DETERMINED UPON: The constitutionality of an act of the legislature cannot be determined collaterally by the court in an application for a writ of mandate by a private party to enforce a private right.—*Wright v. Kelly* (Idaho), 43 Pac. 565.

ORDERS FOR INFERIOR TRIBUNALS: Mandamus will not lie to reverse the order of an inferior tribunal continuing the hearing of an action or proceeding before it, when such inferior tribunal is exercising a judicial discretion.—*Sullivan, C. J. dissenting.*—*Board of Commissioners of Shoshone County v. Mayhew*, Judge (Idaho), 51 Pac. 411.

SAME: Under the facts stated in the opinion the court refused to issue a writ of mandamus to compel district court to order a writ of execution to issue.—*Bowen v. Weatherman*, 2 Idaho, 1184, 31 Pac. 814.

AGAINST PUBLIC OFFICERS: Where the writ is sought to compel the commissioners of a county to perform an official act, the respondents must be de facto officers of such county at the time such writ is to issue.—*Wright v. Kelly* (Idaho), 43 Pac. 565.

TO STATE AUDITOR, PAYMENT OF STENOGRAPHER: Mandamus will issue to compel the state auditor to issue a warrant for the payment of the court reporter's salary as required by law.—*Gilbert v. Moody*, 2 Idaho, 747, 25 Pac. 1092.

SAME, COMPENSATION OF LEGISLATORS: Writ against state auditor to compel the payment of compensation of legislators.—*Goodnight v. Moody*, 2 Idaho, 751, 26 Pac. 121.

SAME, FUND NOT ESTABLISHED: A writ of mandate will not issue to compel a state auditor to draw his warrant on a fund that has never been established by law.—*Curtis v. Moody*, 2 Idaho, 860, 27 Pac. 732.

WAGON ROAD COMMISSIONERS: Mandamus will not lie to direct the board of state wagon road commissioners to allow a claim already rejected by the board.—*Payne v. State Board of*

Wagon Road Commissioners (Idaho), 39 Pac. 548.

SECRETARY OF STATE, ELECTION: Writ of mandate is the proper proceeding to compel the secretary of state to file and certify a ticket entitled to filing and certification by such officer.—*Williams v. Lewis*, Secretary of State (Idaho), 54 Pac. 619.

PRODUCTION AND CORRECTION OF LEGISLATIVE JOURNALS: Revised Statutes of Idaho, Sec. 124, provides that the clerk at the close of each session of the legislature must arrange all bills and papers and deliver them to the secretary of the territory, who must certify to their reception. Section 190 charges the secretary of the territory with the custody of the journals of the legislature. Section 1844 of the organic act provides that the secretary shall record and preserve all the laws and proceedings of the legislature. Held, that mandamus will not lie upon the application of the speaker of the house of representatives to compel the secretary of the territory to produce a document delivered to him by the clerk of the house, and purporting to be the journal thereof, signed by the speaker pro tem, in order that petitioner might make corrections therein, and to receive the corrected journal as the journal of the house.—*Berry, J.*, dissenting.—*Burkhart v. Reed*, 2 Idaho, 470, 22 Pac. 1.

SAME, CORRECTION OF RECORDS: Rev. St. Idaho, Section 124, provides that the secretary of the territory must certify to the reception of all bills and papers belonging to both houses of the legislature delivered to him by the respective clerks. Section 1844 of the organic act provides "that he should record and preserve all the laws and proceedings of the legislative assembly." Held, that mandamus would not lie on the application of the president of the council of the session of the legislature to compel the secretary of territory to record a report of such president as part of the proceedings of the session, or to expunge from the records of such proceedings, part of the former report made by the clerk. *Berry, J.*, dissenting.—*Clough v. Curtis*, 2 Idaho, 488, 22 Pac. 8.

COUNTY AUDITOR, ELECTION: Mandamus granted to compel county auditor to issue a certificate of election to petitioner entitled thereto.—*Cunningham v. George*, 2 Idaho, 1196, 31 Pac. 809.

COUNTY COMMISSIONERS, ELECTION: A person who has been duly elected to a county office, and at the time appointed by law presents his official bond, and offers to take the oath of office required by law, before the

board of commissioners of said county, who refuse to administer such oath, is entitled to a writ of mandate to compel said board to administer said oath, and admit him to said office.—*Blake v. Board of Com. of Ada County (Idaho)*, 47 Pac. 734 (cases cited.)

DE FACTO SHERIFF, RIGHT TO OFFICE: Though Code Idaho, Sec. 380 forbids the county commissioners to issue warrants for the salary of an office during the pendency of a suit to contest an election thereto, the person who is in possession of the office of sheriff and performing the duties thereof under a certificate of election issued by the canvassing board is entitled to the fees and expenses of the office; and on application a writ of mandamus will issue, compelling the commissioners to issue a warrant therefor.—*In re Havrid*, 2 Idaho, 652, 24 Pac. 542.

PROBATE PROCEEDINGS: Under the facts stated in the opinion the court held that a plain, speedy, and adequate remedy by appeal having been thus provided, a writ of mandate will not issue to compel the issuance of an order by probate judge to show cause why real estate of decedent should not be sold.—*State ex rel. Missoula Mercantile Co. v. Whelan*, Probate Judge (Idaho), 53 Pac. 2.

MUNICIPAL CORPORATIONS, OFFICERS, MANDAMUS: When a duty is enjoined by law upon the officers of a municipal corporation (a county) and such officers fail or refuse to perform the duties so enjoined upon them, mandamus will lie to compel the performance by such officers of the duties so enjoined upon them, and in such case the court will, to avoid multiplicity of suits and repeated applications for peremptory writs, direct full compliance, by all officers of such corporation properly before the court, with the requirements of the law under which it is their duty to act.—*Blaine County v. Smith (Idaho)*, 48 Pac. 286.

DUTIES AND POWERS OF MAYOR AND COUNCIL: Where the council of a city organized under the "Act for the organization of cities and villages" (Laws Idaho, 2d Ses. p. 97) have passed upon and allowed a claim against such city, and ordered a warrant upon the city treasury to issue, for the amount thereof, it is the duty of the mayor, on the presentation of such warrant to him for that purpose, to sign the same, and the performance of such duty may be enforced by mandamus.—*Rice v. Gwinn (Idaho)*, 49 Pac. 412.

MANDAMUS AGAINST ADMINISTRATOR: It is the official duty of an administrator enjoined by statute, to

execute a conveyance of real estate after return of sale has been made as required by law, and confirmed by the court, and to execute a conveyance therefor as directed by the order of confirmation. In case of refusal, mandamus will issue to compel him to act.—*People ex rel. Chemung Ming. Co. v. Cunningham* (Idaho), 53 Pac. 451.

OWNER OF CANAL, IRRIGATION. Mandamus will not lie to compel the owner of a canal, to furnish water to an applicant for irrigation purposes, until a rate for the rental of such water has been fixed, there being a speedy, plain, and adequate remedy in an action at law.—*Wilderding v. Green* (Idaho), 54 Pac. 134.

Mandamus lies only to prevent failure

of justice, and where there is not a specific remedy in the ordinary course of law; and there should not only be a lack of specific legal remedy, but there should be a specific legal right. This section is but a reaffirmance of the common law.—*People v. Olds*, 3 Cal. 167, 58 Am. Dec. 398.

Mandamus will not lie to review action of the court which is judicial and discretionary in its nature, but the remedy, if an error has been committed, is by appeal.—*People v. Pratt*, 28 Cal. 166, 87 Am. Dec. 110.

Mandamus to compel surrender of an office.—See *Stevens v. Carter*, 27 Ore. 553, 40 Pac. 1074, 31 L. R. A. 342 and note pages 342-368.

Section 3771. Writ either Alternative or Peremptory: The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a specified time and place, why he has not done so. The peremptory writ must be in a similar form except that the words requiring the party to show cause why he has not done as commanded must be omitted, and a return day inserted.

1887 R. S. Sec. 4979.

Section 3772. Application without Notice, Alternative Writ, Otherwise Peremptory: When the application to the court is made without notice to the adverse party, and the writ be allowed the alternative must be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court whether the adverse party appear or not.

1887 R. S. Sec. 4980.

ANSWERS, HEARING; TRIAL OF FACTS.

Section 3773. Adverse Party may Answer under Oath: On the return of the alternative, or the day on which the application of the writ is noticed, the party on whom the writ or notice has been served may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action.

1887 R. S. Sec. 4981.

Section 3774. Upon Question of Fact, Court may Order Jury Trial: If an answer be made which raises a question as to a matter of fact essential to the determination of the motion and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the

writ is based, the court may, in its discretion, order the question to be tried before a jury and postpone the argument until such trial can be had and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained in case they find for him.

1887 R. S. Sec. 4982.

FINDINGS OF FACT, RESPONSIVENESS TO ISSUE: Where the answer to an application for mandamus to compel defendant, as county auditor to draw a warrant in favor of plaintiffs for the construction of a court house, alleges that, before plaintiffs presented to defendant the order from the county commissioners for the amount due on the contract, a garnishment was served on defendant in a cause then pending in the district court wherein plaintiffs were defendants, a finding that defendant was served with a writ of attachment in an action then pending in

which plaintiffs were defendants, and that such action had proceeded to judgment, and that the judgment remained unsatisfied, is not warranted by the issues.—Carson v. Thews, 2 Idaho, 162, 9 Pac. 605.

PLEADING, MANDAMUS: A denial in response to an application for a writ of mandate to compel the issuing of a warrant in payment of an allowed claim, that any indebtedness existed in favor of the applicant is a denial of a conclusion of law, and therefore, is insufficient to tender an issue.—McConoughey v. Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53.

Section 3775. Applicant may Demur to Answer or Countervail by Proof: On the trial, the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance.

1887 R. S. Sec. 4983.

Section 3776. Motion for New Trial, where made: The motion for new trial must be made in the court in which the issue of fact is tried.

1887 R. S. Sec. 4984.

NEW TRIAL, ORIGINAL PROCEEDING IN SUPREME COURT: Motion for a new trial is not a proper proceeding in the supreme court to ob-

tain a rehearing on an issue of law, when said court is proceeding under its original jurisdiction.—People v. George, 2 Idaho, 848, 26 Pac. 983.

Section 3777. Transmission of Verdict. Argument of Application: If no notice of a motion for a new trial be given, or if given, the motion be denied, the clerk, within five days after rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.

1887 R. S. Sec. 4985.

Section 3778. Proceedings when Question of Law Alone Involved: If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case.

1887 R. S. Sec. 4986.

JUDGMENT AND ENFORCEMENT.

Section 3779. Judgment, Damages, Costs, Peremptory Mandate: If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay.

1887 R. S. Sec. 4987.

Section 3780. Service of Writ: The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not.

187 R. S. Sec. 4988.

Enforced by serving certified copy,

Service of summons, manner of: Sec. 3193 et seq. etc.: Sec. 3534.

Section 3781. Penalty for Disobedience of Writ: When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board or person, if it appear to the court that any member of such tribunal, corporation or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders, necessary and proper for the complete enforcement of the writ.

1887 R. S. Sec. 4989.

required by the court is performed:

Imprisonment for contempt until act Sec. 3830.

CHAPTER CLXXIII.

WRIT OF PROHIBITION.

Section.

3782. Prohibition defined.

3783. When and where issued.

3784. Writ may be alternative or peremptory.

Section.

3785. Certain provisions of preceding chapter applicable.

Section 3782. Prohibition Defined: The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

1887 R. S. Sec. 4994.

Commencement of action stayed by prohibition, statute of limitations does not run: Sec. 3148.

The writ of prohibition is the counterpart of the writ of mandate, and subject to the same conditions.—Belle-

vue Water Co. v. Stockslager, Judge (Idaho), 43 Pac. 568.

REMEDY AT LAW, CONSTITUTIONALITY: The writ of prohibition will not issue where there is a plain, speedy, and adequate remedy at law. The constitutionality of an act of the

legislature will not be passed upon in an application for a writ of prohibition in a case where it is not directly in issue, and is only collateral to the questions in issue as shown by the petition.—*Bellevue Water Co. v. Stockslager*, Judge (Idaho), 43 Pac. 568 (cases cited.)

DISTRICT COURT: A writ of prohibition will issue to prohibit a district court from further proceeding in an action, which has been dismissed, according to the provisions of Section 4194 of this Code, by the plaintiff in said action paying the costs, and filing his dismissal of the same with the clerk.—*Boyd v. Steele*, Judge (Idaho), 59 Pac. 21.

SAME, QUESTIONS OF PLEADING: Writ of prohibition does not lie to arrest the action of a district court upon a mere question of pleading.—*Willman v. District Court in and for Alturas County (Idaho)*, 35 Pac. 692.

SAME, ACTS OUTSIDE OF JURISDICTION: A writ of prohibition to prevent proceedings before a district court, or the judge thereof, will not be issued in any case unless it is so clear

that such court or judge is acting outside of or beyond its jurisdiction that there is no reasonable doubt of the fact.—*In re Miller (Idaho)*, 43 Pac. 870.

ACTS OF MINISTERIAL OFFICERS: Writ of prohibition under the statutes of Idaho, will lie to restrain the action of a ministerial officer, when it appears that such action is illegal and beyond his jurisdiction; as the secretary of state in certifying to the county auditors, a ticket not entitled to be certified.—*Williams v. Lewis*, Secretary of State (Idaho), 54 Pac. 619.

SCOPE OF REMEDY: This section, making a writ of prohibition "the counterpart of a writ of mandate" does not enlarge the class of cases in which the writ may be resorted to in view of the clause providing that the writ is to arrest the proceedings of any tribunal which are without, or in excess of, jurisdiction.—*State v. District Court (Mont.)*, 56 Pac. 219.

Distinction between writs of prohibition and mandamus.—See note 3 L. R. A. 56.

Section 3783. When and where Issued: It may be issued by the supreme or any district court, to an inferior tribunal, or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

1887 R. S. Sec. 4995. Amended by commission to comply with Const. Art. V, Secs. 9 and 20.

Parties designated as plaintiff and defendant: Sec. 3285.

Proceedings had at chambers: Sec. 3287.

General rules of practice in district court applicable when not inconsistent: Sec. 3288.

Proceedings may be instituted on Sunday or holiday: Sec. 3026.

Upon application for writ of prohibition the petition must show all facts entitling the petitioner to the writ and if it does not the writ will be denied:—*In re Frances (Idaho)*, 60 Pac. 561.

PROHIBITION, NATURE OF THE WRIT GENERALLY: A writ of prohibition should not be granted except in cases of usurpation or abuse of power, and not then unless the other remedies provided by law are inadequate to afford full relief.—*Walcott v. Wells*, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478 and note.

Writ of prohibition stays all proceedings of the court which are not completed and ended, and if necessary to afford complete and adequate relief, what has been done will be undone. The

writ cannot be denied merely because the applicant might have moved the court to set aside the invalid order or judgment. Though the writ does not issue to try title to property, yet if a court by its order takes property out of the possession of a stranger to the proceedings, who claims it as his own, the order is in excess of its jurisdiction, irrespective of the actual state of the title, and the writ of prohibition will issue to annul such order.—*Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192 and note.

Note.—This remedy and the practice therein is fully discussed in the above cases.

PROHIBITION OF COURT EXCEEDING ITS JURISDICTION: A court that proceeds in the trial of a cause against an express prohibition of a statute is exceeding its jurisdiction and may be prevented by prohibition from the supreme court. Where, therefore, a justice's court refuses to stay proceedings in a case not within the exceptions of the insolvent act, a writ of prohibition will be issued to restrain it from further proceedings, notwithstanding an order of the superior court in which the insolvency proceedings are

pending, assuming to permit such justice's court to proceed with the cause.—

Hayne v. Justice's Court, 82 Cal. 284, 23 Pac. 125, 16 Am. St. Rep. 114 and note.

Section 3784. Writ may be Alternative or Peremptory: The writ must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court, at a specified time, and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted and a return day inserted.

1887 R. S. Sec. 4996.

Section 3785. Certain Provisions of Preceding Chapter Applicable: The provisions of the preceding Sections from 3772 to 3781, both inclusive, apply to the proceedings for writ of prohibition.

1887 R. S. Sec. 4997.

CHAPTER CLXXIV.

MISCELLANEOUS PROVISIONS RELATING TO SPECIAL WRITS.

Section.

3786. Parties, how designated.

3787. Judgment and orders defined.

3788. Writs may issue and be heard at chambers.

Section.

3789. Practice and appeals, provisions applicable.

3790. Writ of scire facias abolished.

Section 3786. Parties, how Designated: The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant.

1887 R. S. Sec. 4955.

Section 3787. Judgment and Orders Defined: A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding.

1887 R. S. Sec. 4956.

Motion and rules defined: Sec. 3707.

Section 3788. Writs may Issue and be Heard at Chambers: Writs of review, mandate, and prohibition may be issued by any of the justices of the supreme court, or by any district judge, in vacation, and may, in the discretion of the justice or judge issuing the writ, be made returnable and a hearing thereon be had in vacation.

1887 R. S. Sec. 5000.

District court given jurisdiction: Sec. 2995.

Review, mandate and prohibition may be tried at chambers, district court: Sec. 3028.

Review, mandamus and prohibition and motion for new trial may be heard before judge of another district if judge absent: Sec. 3028.
Application for order refused no sub-

sequent application before any other judge except of a court of superior jurisdiction: Sec. 3037.
Penalty for second application: Sec. 3038.

Section 3789. Practice and Appeals, Provisions Applicable: Except as otherwise provided, the provisions of this Code relative to civil actions in the district court, including those relating to new trials and appeals therefrom, are applicable to and in as far as not inconsistent with the special provisions relating thereto, constitute the rules of practice in certiorari, mandamus, and prohibition proceedings.

1887 R. S. Secs. 5005 and 5006, re-written.

Section 3790. Writ of scire facias Abolished: The writ of scire facias is abolished.

1887 R. S. Sec. 4611.

SCIRE FACIAS, OBTAINING REMEDY BY ACTION: Although the form of the ancient writ of scire facias has been abolished by the statutes the remedies obtainable by the writ may still be enforced by a civil action. The mode of enforcing a judgment by exe-

cution, obtained by leave of the court after a lapse of five years from the entry of the judgment, is a cumulative remedy, in no way affecting the right to revive the judgment by suit for that purpose.—Haupt v. Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698.

CHAPTER CLXXV.

ADJUDICATION OF WATER RIGHTS.

Section.

3791. Notice of claim, requisites and publication.

3792. Complaint, when filed, allegation essential.

Section.

3793. Trial, findings and decree.

3794. Answer, contesting claim, costs.

Section 3791. Notice of Claim, Requisites and Publication: In all cases of claimants of any of the water of any stream, where the water of said stream has been adjudicated by decree of court, who shall claim the right to the use of any of the water of such stream, and shall not have included in said decree for any cause, may have his right, which he so claims to use any of such water summarily adjudicated by the district court of the county when said claim is given by notice by publication in a newspaper in said county, if one be published there, if not then by filing such notice with the clerk of said district court of said county, which notice shall be published for thirty days in such paper, and if there be no paper published in said county, then such notice shall be posted in the office of the said clerk of the court, which notice shall contain substantially the following: That the claimant claims of the water of such stream for irrigation or domestic use certain quantities, naming the quantities and cubic feet per second of time, describing in such notice the place of diversion of such water, the land upon which it is to be or has been used the amount of land in cultivation at the date of the notice, that the land is arid land, the date of diversion of the water, the amount then diverted and put to a useful purpose, the amount of land in cultivation at the date of such diversion,

1899, 5th Ses. p. 371, Sec. 6,

Section 3792. Complaint, when Filed. Allegation Essential: Such claimant, mentioned in Section 3791 shall file his complaint in the district court at least three days before the first day of the term; his complaint shall substantially set out the state of facts contained in the notice required by the provisions of Section 3791, together with the allegation that such notice has been published in a newspaper, naming the paper, or filed with the clerk of the district court at least six weeks prior to the first day of said term, and praying the court to take proof of claimant's claim to the use of a proportion of such water, and adjudge and decree his right to the same.

1899, 5th Ses. p. 371, Sec. 7.

Section 3793 Trial, Findings and Decree: The district court shall try such claim of said applicant in the same manner, and be governed by the same law and rules as govern the court in the trial of water rights between individual litigants, and shall determine from the evidence the right said applicant shall have, if any, to the use of water of such stream; and shall file such findings, which shall thereafter become a decree in favor of said applicant against any person trespassing upon the rights established by said decree.

1899, 5th Ses. p. 371, Sec. 8.

Section 3794. Answer, Contesting Claim, Costs: Upon filing the complaint as provided by Section 3792, praying for a decree awarding to any person a right to the use of any of the water in any stream of which this chapter treats, any owner of water of such stream, or any person to whom the court may have heretofore decreed the right of the use of any such water, may file an answer to such complaint, denying generally or specifically the allegations of said complaint, and such person may produce witnesses to disprove the allegation of such complaint, or rebut any testimony offered by such claimant and establishing his right to the use of any such water, and in all such trials any such applicants shall pay all costs incurred by him, and in case any person by answer to such complaint shall create any costs, shall be responsible for all such costs.

1899, 5th Ses. p. 372, Sec. 9.

CHAPTER CLXXVI.

CONTESTING ELECTIONS.

JURISDICTION OF COURTS, PARTIES.

Section.

3795. Judicial office, supreme court to hear.

3796. Removal county seat, etc., district court to hear.

3797. County and other office, jurisdiction, district court.

3798. Who may contest.

PLEADINGS, PROCESS.

Section.

3799. Complaints, allegations, essential, cost and bonds.

3800. Contested ballots, names of persons voting.

3801. Summons, copy of complaint.

TRIAL, EVIDENCE, WITNESSES.

3802. Trial, when.

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Section.

3804. Rules of practice and evidence, power of court.

3805. Testimony, depositions, subpoenas.

3806. Sufficiency of complaint, amendment, dismissal.

3807. Process, service, fees.

3808. Voters required to testify.

INSPECTION OF BALLOTS, ETC.

3809. Inspection of ballots and poll books.

3810. Proceedings upon inspection.

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JUDGMENT.

3811. Cost, judgment for.

3812. Judgment, matters determined.

3813. Tie vote, decision by lot.

3814. Order to put in possession.

3815. Party having plurality, ineligible, election void.

APPEALS.

3816. Appeal, supersedeas bond required.

3817. Judgment in appellate court.

3818. Bond for costs by appellant.

JURISDICTION OF COURTS, PARTIES.

Section 3795. Judicial Office. Supreme Court to Hear: The supreme court shall hear and determine contests of the election of judges of the supreme court, judges of the district courts, and district attorneys; and in case they shall disagree, the governor shall act with them in determining the contest, but no judge of the supreme court shall sit upon the hearing of any case in which he is a party.

1899, 5th Ses. p. 61, Sec. 124.

Proceedings for contesting the election of executive officers of the state:

Pol. Code, Sec. 47 et seq.

Legislature, contesting election of members of: Pol. Code, Sec. 49 et seq.

Section 3796. Removal County Seat, etc., District Court to Hear: The district courts of the respective counties shall hear and determine contests of election in regard to the removal of county seats, and in regard to any other subject which may by law be submitted to the vote of the people of the county, and the proceedings therein shall be conducted as near as may be hereinafter provided for contesting the election of county officers.

1899, 5th Ses. p. 61, Sec. 125.

Section 3797. County and other Offices. Jurisdiction. District Court: The district courts shall hear and determine contests of all other county, township and precinct officers, and officers of the cities and incorporated villages within the county.

1899, 5th Ses. p. 61, Sec. 126.

Section 3798: Who may Contest: The election of any person declared elected to any office other than executive State officers and members of the legislature, may be contested by any elector of the State, judicial district, county, township, precinct, city or incorporated village in and for which the person is declared elected.

1899, 5th Ses. p. 63, Sec. 135.

PLEADINGS, PROCESS.

Section 3799. Complaints, Allegations Essential. Cost Bond: The contestants shall file in the proper court, within twenty days after the votes are canvassed, a complaint, setting forth the name of the contestant, and that he is an elector competent to contest such election; the name of the incumbent, the office contested, the time of the election, and the particular causes of contest, which

complaint shall be verified by the affidavit of the contestant, that the causes set forth are true as he verily believes. The contestant must also file a bond, with security, to be approved by the clerk of the court, or district judge, as the case may be, conditioned to pay all costs in case the election be confirmed, the complaint dismissed, or the prosecution fail.

1899, 5th Ses. p. 63, Sec. 136.

Section 3800. Contested Ballots, Names of Persons Voting: When the reception of illegal or the rejection of legal votes is alleged as a cause of contest, the names of the persons who so voted, or whose votes were rejected, if known, with the precinct, township or ward where they voted or offered to vote, shall be set forth in the complaint.

1899, 5th Ses. p. 63, Sec. 137.

ELECTION CONTEST, BALLOTS: Ballots, when their integrity is satisfactorily established, are the best evidence in an election contest of how the elector voted.—*Tebbe v. Smith*, 103 Cal. 101, 41 Pac. 454, 49 Am. St. Rep. 68.

A ballot should not be rejected because there is on its back a faint type impression of a portion of the face of a similar ticket produced, when there is too much ink upon the type used in printing, by placing one ticket face downward upon the back of another which preceded it from the press, if there is no evidence tending to show that the ticket was marked in this manner for the purpose of distinguishing it from other ballots.—*Rutledge v. Crawford*, 91 Cal. 526, 27 Pac. 779, 25 Am. St. Rep. 212. Contesting elections and evidence in general.—*Id.*

WHAT MARKS WILL NOT AVOID A BALLOT: The fact that a ballot was written by a hand unaccustomed to the use of a pencil, or that there was awkwardness in the use of the pencil, or carelessness in the preparation of the ballot, or an apparent attempt to retrace a clumsily made cross or X, or an effort made to make it more certain, and, in doing so, employing more lines than are necessary to make a cross properly, or a slightly blurred cross to correct a mistake, not including an intention to identify the ballot, or a slight erasure for the same purpose, or a cross

made when the ballot paper was defective, and, to avoid the defect, and to make the vote more certain a second cross was made, or a slight pencil mark, clearly made by accident, and not design, or a stain of tobacco, will not avoid the ballot.—*Dennis v. Caughlin*, 22 Nev. 447, 41 Pac. 768, 58 Am. St. Rep. 761.

What marks will avoid a ballot.—*Id.*

Ballot with name of candidate misspelled should be counted when it is certain as to who was intended.

The failure of judges of election to take the oath is not ground for rejecting the returns.

Changing place of voting to another place three miles from designated point held to render election void.

Illegal votes may be apportioned under certain conditions.

Statement of election contest may be amended during trial of the case by correcting the names of persons and adding other names, to make it conform to the proof.

A subpoena issued to certain alleged illegal voters, with the return thereon, showing that the persons named therein could not be found, is admissible in evidence as tending to show a proper effort on the part of the party at whose instance it was issued, to produce to the court the best evidence.—*Heyfron v. Mahoney*, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757, and note.

Section 3801. Summons, Copy of Complaint: Upon the filing of such complaint summons shall issue against the person whose office is contested, in the same manner as in civil actions, and a copy of the complaint shall in all cases accompany the summons.

1899, 5th Ses. p. 63, Sec. 138.

TRIAL, EVIDENCE, WITNESSES.

Section 3802. Trial, when: The cause shall stand for trial at the expiration of thirty days from the time of service of the

summons and complaint, if the court shall then be in session; otherwise, on the first day of the next term thereafter.

1899, 5th Ses. p. 63, Sec. 139.

Section 3803. Postponements: The trial shall proceed at the time appointed, unless postponed for good cause shown by affidavit, the terms of which postponement are in the discretion of the court.

1899, 5th Ses. p. 63, Sec. 140.

Section 3804. Rules of Practice and Evidence.

Power of Court: The proceedings shall be simulated to those in an action, so far as practicable, but shall be under the control and direction of the court, which shall have all the powers necessary to the right hearing and determination of the matter; to compel the attendance of witnesses, swear them and direct their examination; to punish for contempt in its presence or by disobedience to its lawful mandate; to adjourn from day to day; to make any order concerning immediate costs, and to enforce its orders by attachment. It shall be governed by the rules of law and evidence applicable to the case.

1899, 5th Ses. p. 63, Sec. 141.

ELECTIONS, IRREGULARITY AND FRAUD, EVIDENCE: When an election is so irregular and fraudulent that the true result cannot be ascertained

from the returns of the poll, they should be rejected and the true result shown by other evidence.—*Chamberlain v. Woodin*, 2 Idaho, 609, 23 Pac. 177.

Section 3805. Testimony. Depositions. Subpoenas:

The testimony may be oral, or by depositions taken as in other actions in the court where the case is tried. Subpoenas for witnesses may be issued as in other cases any time after the filing of the complaint.

1899, 5th Ses. p. 63, Sec. 142.

Section 3806. Sufficiency of Complaint. Amendment. Dismissal:

The proceedings shall not be dismissed for want of form, if the particular causes of contest are alleged with such certainty as will sufficiently advise the incumbent of the real grounds of contest. If any part of the causes are held insufficient they may be amended, but the incumbent will be entitled to an adjournment if he state on oath that he has a matter of answer to the amended causes, for the preparation of which he needs further time. Such adjournment shall be upon such terms as the court deem reasonable; but if all the causes are held insufficient, and an amendment is asked, the adjournment shall be at the cost of the contestant. If no amendment is asked for or made, or in case of entire failure to prosecute, the proceedings may be dismissed.

1899, 5th Ses. p. 63, Sec. 143.

Section 3807. Process, Service, Fees: The style, form and manner of service of process and papers, and the fees of officers and witnesses shall be the same as in other cases in the court where the cause is tried.

1899, 5th Ses. p. 64, Sec. 144.

Section 3808. Voters Required to Testify: The court may require any person called as a witness, who voted on such election, to answer touching his qualifications as a voter; and if he was not a qualified voter in the county where he voted, then to answer for whom he voted; and if the witness answer such questions no part of his testimony on that trial shall be used against him in any criminal action.

1899, 5th Ses. p. 64, Sec. 145.

INSPECTION OF BALLOTS, ETC.

Section 3809. Inspection of Ballots and Poll Books: If an inspection of the ballots or poll books of any election district in this State shall become necessary for the determination of any election contest before any court, the presiding judge thereof may by order, naming the district or districts, require the proper officer to procure the same from the county auditor, or other person in whose possession or custody the same may be, and such clerk or person shall deliver the same to said officer, who shall deliver them unopened to such presiding judge.

1899, 5th Ses. p. 64, Sec. 146.

Section 3810. Proceedings Upon Inspection: The presiding officer shall open and inspect the same in open court, in the presence of the parties or their attorneys, and immediately after such inspection shall again seal them in an envelope and return them, by mail, or otherwise, to the office of the county auditor in which they were at first required to be filed.

1899, 5th Ses. p. 64, Sec. 147.

JUDGMENT.

Section 3811. Costs, Judgment for: The contestant and the incumbent are liable to the officers and witnesses for the costs made by them respectively. But if the election be confirmed, or the complaint be dismissed, or the prosecution fail, judgment shall be rendered against the contestant for costs; and if the judgment be against the incumbent, or the election be set aside it shall be against him for costs.

1899, 5th Ses. p. 64, Sec. 148.

Section 3812. Judgment, Matters Determined: The judgment of the court in cases of contested election shall confirm or annul the election according to the right of the matter; or, in case the contest is in relation to the election of some person to an office shall declare as elected the person who shall appear to be duly elected.

1899, 5th Ses. p. 64, Sec. 149.

Section 3813. Tie Vote. Decision by Lot: If it appears that two or more persons have—or would have had if the legal ballots cast or intended to be cast for them had been counted—the highest and equal number of votes for the same office, the persons receiving such votes shall decide by lot, in such manner as the court

shall by written order direct, which of them shall be declared duly elected; and the judgment shall be entered accordingly.

1899, 5th Ses. p. 64, Sec. 150.

Section 3814. Order to Put in Possession: When either the contestant or incumbent shall be in possession of the office by holding over, or otherwise, the court shall, if the judgment be against the party so in possession of the office and in favor of his antagonist, issue an order to carry into effect the judgment of the court, which order shall be under the seal of the court, and shall command the sheriff of the county to put the successful party into possession of the office without delay, and to deliver to him all books and papers belonging to the same; and the sheriff shall execute such order as other writs.

1899, 5th Ses. p. 64, Sec. 151.

Section 3815. Party Having Plurality, Ineligible; Election Void: When the person whose election is contested is found to have received the highest numbers of legal votes, but the election is declared null by reason of legal disqualifications on his part, or for other causes, the person receiving the next highest number of votes shall not be declared elected, but the election shall be declared void.

1899, 5th Ses. p. 65, Sec. 152.

APPEALS.

Section 3816. Appeals, Supersedeas Bond Required: The party against whom judgment is rendered in cases tried in the district court may appeal to the supreme court, and if the appellant be in possession of the office, such appeal shall not supersede the execution of the judgment of the court, as provided in the preceding Section, unless he give a bond with security, to be approved by the court, in a sum to be fixed by the court, and which shall be at least double the probable compensation of such officer for six months, which bond shall be conditioned that he will prosecute his appeal without delay, and that if the judgment appealed from be affirmed, he will pay over to the successful party all compensation received by him while in possession of said office after the judgment appealed from was rendered, and such bond shall contain the express consent that judgment may be rendered against the sureties on the appeal as provided in the following Section.

1899, 5th Ses. p. 65, Sec. 153.

APPEAL, REVIEW, EFFECT: A suit was brought under act Idaho January 30, 1885, to contest the election of a sheriff who had received a certificate of election from the canvassing board of the county. On appeal to the supreme court, the act was declared unconstitutional and the judgment reversed. Held, the effect of such reversal was to declare the suit a nullity and should have been dismissed by the court below.—In re Havrid, 2 Idaho, 652, 24 Pac. 542.

DE FACTO SHERIFF, RIGHT TO OFFICE, MANDAMUS: Though Code Idaho, Sec. 380, R. S. (325 of the Political Code), forbids the county commissioners to issue warrants for the salary of an office during the pendency of a suit to contest an election thereto, the person who is in possession of the office of sheriff and performing the duties thereof under a certificate of election issued by the canvassing board is entitled to the fees and expenses of the office; and on application a writ of mandamus will issue, compelling the

commissioners to issue a warrant therefor.—In re Havird, 2 Idaho, 652, 24 Pac. 542.

Note.—The provisions of the above section requiring the incumbent to execute an undertaking conditioned to the

payment of salary, etc., to contestant would seem to preclude the idea that the salary should be paid, pending the proceedings, to other than the de facto officer, incumbent.

Section 3817. Judgment in Appellate Court: If upon the appeal the judgment be affirmed, the appellate court shall render judgment against the appellant and the sureties on his bond, or either of them, for the amount which the appellee is entitled to recover from the appellant on account of such contest, together with the costs; but in such case the sureties, or either of them, shall be entitled to produce and examine witnesses concerning the amount of such recovery.

1899, 5th Ses. p. 65, Sec. 154.

Section 3818. Bond for Costs by Appellant: If upon appeal the appellant shall not be in possession of the office, he shall give bond, with security to be approved by the court where the judgment is rendered, conditioned to pay all costs that may be adjudged against him upon such appeal.

1899, 5th Ses. p. 65, Sec. 155.

CHAPTER CLXXVII.

CONTEMPTS.

Section.

WHAT ACTS ARE.

- 3819. What acts or omissions are contempts.
- 3820. Re-entry on property after eviction, when a contempt, acquisition, arrest, hearing.
- 3821. Contempt committed in presence of court, punished summarily.
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- 3823. Warrant of attachment or notice to show cause.
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- 3826. Bail bond, form and conditions of.
- 3827. Officer must return warrant and undertaking.
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- JUDGMENT, PENALTY, ENFORCEMENT.
- 3829. Judgment and penalty, if guilty.
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- 3832. Illness, sufficient cause for non-appearance of party arrested.
- 3833. Judgment and orders in such cases final.

WHAT ACTS ARE.

Section 3819. What Acts or Omissions are Contempts: The following acts or omissions in respect to a court of justice, or proceeding therein, are contempts of the authority of the court:

1. Disorderly, contemptuous or insolvent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceedings:

2. A breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceedings;

3. Misbehavior in office or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner or other person appointed or elected to perform a judicial or ministerial service;

4. Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding;

5. Disobedience of any lawful judgment, order, or process of the court;

6. Assuming to be an officer, attorney, counsel of a court, and acting as such without authority;

7. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court;

8. Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial;

9. Any other unlawful interference with the process or proceedings of the court;

10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

11. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

12. Disobedience, by an inferior tribunal, magistrate or officer of the lawful judgment, order or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer.

1887 R. S. Sec. 5155.

Sub. 12. Power of judicial officers to punish for contempt: Sec. 3035.

Juror failing to attend, fine not exceeding \$100 may be imposed: Sec. 3075.

Interpreter not obeying summons is guilty of contempt: Sec. 4408.

Witness refusing to attend or to be sworn: Secs. 4460, 4461. Penalty \$100 to aggrieved party.

Warrant of commitment in case of: Sec. 4463.

Deposition, witness refusing to appear before officer: 4506.

Subpoena, witness to attend before commissioner, issued by judge, court or U. S. officer, reported disobedience punished as contempt, same as if issued by judge or justice: Sec. 4455.

Arresting witness in civil action, claiming exemption, when officer liable: Secs. 4470-4472.

Contempts, public administrator citing person to appear, refusing to an-

swer, committed until he obeys: Sec. 4332.

Committing by probate judge, of administrator refusing examination on proceedings to remove: Sec. 4103.

Person charged with embezzlement of estate, examination, contempt: Secs. 4117, 4118.

Practicing law without license: Sec. 3093.

Second application for certain orders to another judge, contempt: Sec. 3038.

Mandamus, special provisions for disobedience of writ: Sec. 3781.

A contempt of court is a willful disregard of its authority, and may consist of disorderly or insulting language or behavior in its presence tending to disturb its proceedings or to impair the respect due to its authority, or a disobedience of its rules or orders interfering with the due administration of law.—In re McKnight, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451.

Sub. 3. Supreme court will treat as

contempt use of language in brief filed therein which impugns the motives of, and is disrespectful to, the lower court.—*Sears v. Starbird*, 75 Cal. 91, 16 Pac. 531, 7 Am. St. Rep. 123.

Sub. 9. PUBLICATION OF JUDICIAL PROCEEDINGS: The publication in a newspaper of a report of the testimony taken at a trial before the court sitting without a jury, containing no reflection upon the judge, and nothing to intimidate any witness or other person connected with the trial, cannot constitute a contempt of court, though the court has forbidden such publication. If the publication could not have interfered with the full and fair investigation of the merits of the case no contempt was committed by it, though the evidence so published was of a filthy character, such as a due regard for decency and public morals would have left unpublished.—*In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78; *State of Oregon v. Kaiser* (Or.), 8 L. R. A. 584, and note.

Sub. 9. It is contempt of court to obstruct and take from a police officer, under legal process, personal property taken by him under a search warrant issued by the presiding judge of such court, for the purpose of securing certain documents alleged to have been used in committing a felony.—*In re Lowenthal*, 74 Cal. 109, 15 Pac. 359, 5 Am. St. Rep. 424.

Sub. 9. CONTEMPT: Newspaper

publication charging a judge with "deliberate lying about the law, deliberate intentional falsification in his official capacity, and deliberate intentional denial of justice" in a case before him, in which a demurrer to the complaint has been sustained with leave to amend, and before the time for amendment has expired and the case finally disposed of, is a flagrant abuse of the liberty of the press, an "unlawful interference with the proceedings of a court," and a contempt of court, within the meaning of Sub. 9 of this section.—*Ex parte Barry*, 85 Cal. 603, 25 Pac. 256, 20 Am. St. Rep. 248.

Sub. 12. A stranger to all parties, who disobeys an order appointing a receiver, is not guilty of contempt, where the court made such order without authority of law.—*State v. District Court*, 21 Mont. 155, 53 Pac. 272, 69 Am. St. Rep. 645.

A contempt of court cannot be restrained by an order of court made in advance. Hence a court has no power by order to prevent a theatrical representation which it is alleged will, if allowed to be produced, prevent the accused from having a fair and impartial trial on a capital offense for which he has been indicted.—*Dailey v. Superior Court*, 112 Cal. 94, 44 Pac. 458, 53 Am. St. Rep. 160, and note.

Proceedings in contempt to compel payment of alimony: See note 24 L. R. A. 433.

Section 3820. Re-entry on Property after Eviction, when a Contempt: Every person dispossessed or ejected from or out of any real property by the judgment or process of any court of competent jurisdiction, and who, not having right so to do, re-enters into or upon, or takes possession of, any such real property, or induces or procures any person not having right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered, or from which such process issued. Upon a conviction for such contempt, the court or justice of the peace must immediately issue an alias process directed to the proper officer, and requiring him to restore the party entitled to the possession of such property under the original judgment or process, to such possession.

1887 R. S. Sec. 5156.

ACCUSATION, ARREST, HEARING.

Section 3821. Contempt Committed in Presence of Court, Punished Summarily: When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed.

1887 R. S. Sec. 5157, first half.

Officer's failure to produce the body of the prisoner, in obedience to a writ of habeas corpus, when he has the power to do so, is a contempt committed in the face of the court, and no

affidavit of the facts or order to show cause is necessary to authorize the court to commit him.—Ex parte Sternes 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251.

Section 3822. When not so Committed, Affidavit or Statement shall be Made: When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court, or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer.

1887 R. S. Sec. 5157, last half.

Contempt, though a specific criminal offense, is prosecuted, as a matter of practice, in the cause or proceeding out of which it arose and not as a separate proceeding with a title of its own. Affidavit of facts constituting contempt, committed out of view of the court, need not set forth the pendency of the cause or proceeding, or the provisions

of the order or writ therein, which has been violated; but it is sufficient if the acts done in violation of the order or writ are set forth.

Judicial notice is taken by the court of the proceedings in an action pending before it on a prosecution for contempt for disobeying an order or writ issued therein.—Ex parte Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263.

Section 3823. Warrant of Attachment or Notice to Show Cause: When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

1887 R. S. Sec. 5158.

CONTEMPT: If it appears that a litigant against whom an order to show cause why he should not be punished for a contempt of court has been issued is concealing himself to avoid compli-

ance with the orders of the court and the service of its process, the court may direct that the order to show cause may be served on his attorneys of record.—Foley v. Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147.

Section 3824. Bail may be Given by Person Arrested: Whenever a warrant of attachment is issued, pursuant to this Chapter, the court or judge must direct, by an indorsement on such warrant, that the person charged may be let to bail for his appearance, in an amount to be specified in such indorsement.

1887 R. S. Sec. 5159.

Section 3825. Sheriff must Arrest and Detain the Person: Upon executing the warrant of attachment, the sheriff must keep the person in custody, bring him before the court or judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next Section.

1887 R. S. Sec. 5160.

Section 3826. Bail Bond, Form and Conditions of: When a direction to let the person arrested to bail is contained in the warrant of attachment, or indorsed thereon, he must be discharged from the arrest, upon executing and delivering to the officer, at any

time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the court or judge thereupon; or they will pay as may be directed, the sum specified in the warrant.

1887 R. S. Sec. 5161.

Section 3827. Officer must Return Warrant and Undertaking: The officer must return the warrant of arrest and undertaking, if any, received by him from the person arrested, by the return day specified therein.

1887 R. S. Sec. 5162.

Section 3828. Hearing: When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

1887 R. S. Sec. 5163.

WITNESS: A person accused of a contempt of court cannot be compelled to submit to an examination as a witness on the hearing of an order to show cause why he could not be adjudged guilty of contempt and punished therefor, if the constitution of this state declares that no person shall be compelled, in any criminal case, to be a witness against himself.—*Ex parte Gould*, 99 Cal. 360, 33 Pac. 1112, 37 Am. St. Rep. 57.

CONTEMPT: Where a party is merely summoned under an order of court to appear in person and show cause why he should not be punished for contempt in failing and refusing to obey a prior order of court, he has the right to appear by attorney. That part of the order commanding him to appear

in person is beyond the jurisdiction of the court. If he does so appear by attorney and offers to show cause, an order for his arrest for contempt in not appearing personally is without jurisdiction, and he is entitled to his discharge on habeas corpus.—*Ex parte Gordan*, 92 Cal. 478, 28 Pac. 489, 27 Am. St. Rep. 154.

Contempt of court is not committed by the refusal of the publisher of an article, the publication of which is prosecuted as a contempt of court, to give the names of the persons making the comments referred to in such article. If the publication of the article was a contempt, relevant inquiry ceased when it was ascertained who was its author and publisher.—*In re Mac Knight*, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451.

JUDGMENT, PENALTY, ENFORCEMENT.

Section 3829. Judgment and Penalty, if Guilty: Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both.

1887 R. S. Sec. 5164.

This section prescribes the punishment that may be inflicted by the court upon the person guilty of contempt, and must be held to be a limitation of the power of the court to punish the person so found guilty; and must be held to be a negative of all other modes of punishment. — *Levan v. Third District Court (Idaho)*, 43 Pac. 574 (cases cited.)

The finding of a court that contempt

has been committed is not conclusive in a proceeding by a writ of review if it further appears from all the facts disclosed that the acts charged and found could, in no circumstances, constitute contempt of court.—*In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78.

Attack by habeas corpus upon the judgment of a court committing the prisoner for contempt is subject to the

rules applicable to collateral assaults upon judgments in other cases.—*Ex parte Sternes*, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251.

Inquiry on habeas corpus into the commitment of the prisoner for contempt is confined to the determination whether or not the court has jurisdiction. No irregularity in the proceedings taken to obtain jurisdiction, and no question of injustice or wrong that may have been done to the petitioner can be considered. Judgment of a court having jurisdiction committing a per-

son for contempt is final and conclusive, and can not be collaterally attacked however irregular the proceedings taken to obtain jurisdiction may have been.

Judgment conclusively establishes existence of jurisdictional facts recited by it, so far as collateral proceedings are concerned, and no evidence dehors the record can be received to impeach them.—*Ex parte Ah Men*, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263.

Section 3830. Omission to Perform Act, Person Imprisoned until Performance: When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he has performed it, and in that case the act must be specified in the warrant of commitment.

1887 L. S. Sec. 5165.

Commitment for contempt until party pay over money not in possession or control of such party at the time of instituting the contempt proceedings, as shown by his uncontradicted affidavit, is void for want of jurisdiction, the court having no power to imprison a person for contempt for neglecting or refusing to perform an act which he can not perform.—*Adams v. Haskell*, 6 Cal. 313, 65 Am. Dec. 517.

An order of court directing the imprisonment of a defendant until he shall have paid a certain sum awarded as alimony pendente lite must show that he has been found able to comply with such order.—*Ex parte Silvia*, 123 Cal. 293, 55 Pac. 988, 69 Am. St. Rep. 58; see also note 24 L. R. A. 433.

Section 3831. Proceedings if Party Fail to Appear: When the warrant of arrest has been returned served, if the person arrested do not appear on the return day, the court or judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party by the reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

1887 R. S. Sec. 5166.

Section 3832. Illness Sufficient Cause for Non-Appearance of Party Arrested: Whenever, by the provisions of this Chapter, an officer is required to keep a person arrested on a warrant of attachment in custody, and to bring him before a court or judge, the inability, from illness or otherwise, of the person to attend, is a sufficient excuse for not bringing him up; and the officer must not confine a person arrested upon the warrant, in a prison, or other-

CONTEMPT, DIVORCE, ALIMONY:

When the court granting a divorce has ordered the husband to pay a permanent monthly allowance for the support of his divorced wife, it may imprison him for contempt for violation of its order. His only remedy is to purge himself of such contempt by showing, to the satisfaction of the court, that he is unable to obey the order, and that his inability has not been caused by his own act for the purpose of avoiding payment. When imprisoned for violation of such order, he is not entitled to his discharge upon habeas corpus, if the court, finding him able to pay the allowance, has jurisdiction as shown by the record.—*Ex parte Spencer*, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266.

wise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

1887 R. S. Sec. 5167.

Section 3833. Judgment and Orders in such Cases Final: The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive.

1887 R. S. Sec. 5168.

Appeals allowed to supreme court from judgment contempt, in insolvency proceedings: Sec. 3952.

When the district court, in contempt proceedings, keeps within its jurisdiction, and there is no abuse of the dis-

cretion vested in said court, there is no appeal. Nor will a writ of review lie in such case. When, however, the district court exceeds its jurisdiction, the case may be brought to this court by writ of review.—*Levan v. Third District Court (Idaho)*, 43 Pac. 574.

CHAPTER CLXXVIII.

VOLUNTARY DISSOLUTION OF CORPORATIONS.

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3836. Application, how signed and verified.

Section.

3837. Filing application and publication of notice.

3838. Objection may be filed.

3839. Hearing of application.

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Section 3834. How Dissolved: A corporation may be dissolved by the district court of the county where its office or principal place of business is situated, upon its voluntary application for that purpose.

1887 R. S. Sec. 5185.

Section 3835. Application, what to Contain: The application must be in writing and set forth:

1. That at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a two-third vote of all the stockholders or members:

2. That all claims and demands against the corporation have been satisfied and discharged;

1887 R. S. Sec. 5186.

Involuntary dissolution: Secs. 3441 et seq.

Section 3836. Application, how Signed and Verified: The application must be signed by a majority of the board of trustees, directors, or other officers having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in a civil action.

1887 R. S. Sec. 5187.

Under the preceding sections, the trustees and stockholders of a corporation may make application to the dis-

trict court for its dissolution.—*Security Savings & Trust Co. v. Piper*, Judge (Idaho), 40 Pac. 144; distinguished from *French Bank Case*, 53 Cal. 550.

Section 3837. Filing Application and Publication of Notice: If the judge is satisfied that the application is in conformity with this Chapter, he must order it to be filed with the clerk, and that the clerk give not less than thirty days notice of the application, by publication in some newspaper published in the county, and

if there are none such, then by advertisements posted up in three of the principal public places in the county.

1887 R. S. Sec. 5188.

Section 3838. Objections may be Filed: At any time before the expiration of the time of publication, any person may file his objections to the application.

1887 R. S. Sec. 5189.

Section 3839. Hearing of Application: After the time of publication has expired, the court may, upon five days notice to the persons who have filed objections, or without further notice, if no objections have been filed, proceed to hear and determine the application; and if all the statements herein made are shown to be true, he must declare the corporation dissolved.

1887 R. S. Sec. 5190.

Section 3840. Judgment Roll and Appeal: The application, notices, and proofs of publication, objections (if any), and declaration of dissolution, constitute the judgment roll, and from the judgment an appeal may be taken as from judgments of the district courts.

1887 R. S. Sec. 5191.

CHAPTER CLXXIX.

EMINENT DOMAIN.

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WHEN MAY BE EXERCISED.

Section 3841. Use for which Eminent Domain Exercised: Subject to the provisions of this Chapter, the right of

eminent domain may be exercised in behalf of the following public uses:

1. Public buildings and grounds for the use of the State and all other public uses authorized by the legislature;
2. Public buildings and grounds for the use of any county, incorporated city, village, town or school districts, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, incorporated city, village, or town, or for draining any county, incorporated city, village, or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city, village or town, or the inhabitants thereof;
3. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by roads, plank and turnpike roads, steam and horse railroads, canals, ditches, flumes, aqueducts and pipes, for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable;
4. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also, outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also, an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit or conduct of tailings or refuse matter from their several mines;
5. By-roads leading from highways to residences and farms;
6. Telegraph and telephone lines;
7. Sewerage of any incorporated city.

1887 R. S. Sec. 5210.

Sub. 2. Supplying a town with water is a "public use" within the exercise of eminent domain, and the water of a creek may be condemned therefor.—*St. Helena Water Co. v. Forbes*, 62 Cal. 182, 45 Am. Rep. 659.

PUBLIC USE: If, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material, in applying the doctrine of eminent domain.

MINING: In a state where mining is the dominant industry, the magnitude of the interest involved may properly become a determining factor in sustaining the right of a railroad to construct lateral branches, tracks, and spurs to mines and mining work, as public uses, under the law of eminent domain.—*Butte, Etc. Ry. Co. v. Montana, Etc. Ry. Co.* 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508.

Section 3842. Estates and Rights Subject to Condemnation: The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine;
2. An easement, when taken for any other use;
3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

1887 R. S. Sec. 5211.

Eminent domain proceedings are not necessary where statute reserves right of way for subsequent companies over

the right of way of first locator.—Pacific Ry. Co. v. Wade, 91 Cal. 449, 27 Pac. 768, 25 Am. St. Rep. 201, and note.

Section 3843. Private Property Defined, Classes Enumerated: The private property which may be taken under this Chapter includes:

1. All real property belonging to any person;
2. Lands belonging to this State, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use;
3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated;
4. Franchises for toll roads, toll bridges, and ferries, and all other franchises; but such franchises shall not be taken unless for free highways, railroads, or other more necessary public use;
5. All rights of way for any and all the purposes mentioned in Section 3841, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed, or intersected by any other right of way or improvements or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections and connections shall be made in manner most compatible with the greatest public benefit and least private injury;
6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

1887 R. S. Sec. 5212.

Crossings: Sec. 3850.

CONDEMNATION OF POSSESSORY CLAIM TO LANDS, CONSTRUCTION OF RAILROAD, COMPENSATION: A tract of unsurveyed land of the United States of an agricultural character, was located and settled, and buildings were erected upon it. Defendant, who was qualified to take proceedings to obtain title under the pre-emption laws, bought the right of possession and improvements, took possession, made improvements, and continuously resided

thereon, located the section and filed his declaration to hold it under the pre-emption laws and intended to obtain title thereunder when the land should be surveyed. The provisions for the condemnation of possessory claims for right of way was made by act of congress March 3, 1875, Rev. St. Idaho, Title 7. Held, that the defendant's post-right of way by the railroad company having no right to the land without compensation.—Washington & I. R. R. Co. v. Ossborne, 2 Idaho, 527, 21 Pac. 421.

Section 3844. Facts Necessary to be Found Before Condemnation: Before property can be taken, it must appear:

1. That the use to which it is to be applied is a use authorized by law;
2. That the taking is necessary to such use;
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

1887 R. S. Sec. 5213.

Section 3845. State may Make Location and Surveys: In all cases where land is required for public use, the state or its agents in charge of such use, may survey and locate the same;

but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of this title. The state or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof, and such entry shall constitute no cause for action in favor of the owners of the land, except for injuries resulting from negligence, wantonness or malice.

1887 R. S. Sec. 5214.

JURISDICTION, PLEADINGS AND PROCESS.

Section 3846. Jurisdiction in District Court: All proceedings under this Chapter, must be brought in the district court for the county in which the property is situated. They must be commenced by filing a complaint and issuing a summons thereon.

1887 R. S. Sec. 5215.

Mines, right of way for development of, special proceedings for: Secs. 3861 to 3871.

CONDEMNATION, PROCEEDINGS, JURISDICTION OF DISTRICT JUDGE, HEARING IN CHAMBERS:

A district judge in Idaho has no jurisdiction to hear proceedings after the condemnation of lands, or to enter judgment or decree therein under the statute, at chambers.—*Washington & I. R. Co. v. Coeur d'Alene Ry. & Nav. Co.* 2 Idaho, 991, 28 Pac. 394.

Section 3847. The Complaint and its Contents: The complaint must contain:

1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiffs;
2. The names of all owners and claimants of the property if known, or a statement that they are unknown, who must be styled defendants;
3. A statement of the right of the plaintiff;
4. If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with maps thereof;
5. A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract. All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them, to suit the convenience of parties.

1887 R. S. Sec. 5216.

Section 3848. Summons, what to Contain, how Issued and Served: The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, a statement of the public use for which it is sought, and a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner.

1887 R. S. Sec. 5217.

Section 3849. Who may Defend, what Answer may Show: All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

1887 R. S. Sec. 5218.

Section 3850. Power of Court, may Determine what: The court shall have power:

1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in the fifth subdivision of Section 3843;
2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor;
3. To determine the respective rights of different parties seeking condemnation of the same property.

1887 R. S. Sec. 5219.

TRIAL, DAMAGES, FINAL JUDGMENT, ENFORCEMENT, APPEAL.

Section 3851. Court or Jury to Assess Damages: The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;
2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;
3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be specially and directly benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed, under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;
4. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle guards where fences may cross the line of such railroad;
5. As far as practicable, compensation must be assessed for each source of damages separately,

1887 R. S. Sec. 5220.

Section 3852. Compensation Assessed, Measure Thereof:

For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the last Section. No improvements put upon the property, subsequent to the date of the service of summons, shall be included in the assessment of compensation or damages.

1887 R. S. Sec. 5221.

CONDEMNATION PROCEEDINGS. MEASURE OF DAMAGES, EVIDENCE: In the proceedings for the condemnation of land for railroad purposes under the statutes of Idaho, the value of the land at the time is taken as the measure of damages and it is error to admit evidence of the value at the time of trial. Where, however, one witness stated that the basis of his estimate of damages to be the value of the land at the time of the trial and several others stated that their esti-

mate was based on the value at the time of the taking, and the court repeatedly charged the jury that the value of the property at the time of the taking was the true basis, and the refusal of the court to strike out the testimony of such first witness, held not to be reversible error.

It is error to estimate damages, in such a case, upon what has been paid by the corporation seeking the condemnation of land to owners of adjacent property.—*Spokane & P. Ry. Co. v. Lieuellen*, 2 Idaho, 1101, 29 Pac. 854.

Section 3853. New Proceedings to Cure Defective Title: If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this Chapter prescribed.

1887 R. S. Sec. 5222.

Section 3854. Payment of Damages, or Deposit of Bond Therefor: The plaintiff must, within thirty days after final judgment, pay the sum of money assessed; but may, at the time of or before payment, elect to build the fences and cattle guards; and if he so elect, shall execute to the defendant a bond, with sureties to be approved by the court in double the assessed cost of the same, to build such fences and cattle guards within eight months from the time the railroad is built on the land taken, and if such bond is given, need not pay the cost of such fences and cattle guard. In an action on such bond the plaintiff may recover reasonable attorney's fees.

1887 R. S. Sec. 5223.

Section 3855. Damages, to whom Paid: Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

1887 R. S. Sec. 5224.

Section 3856. Final Order of Condemnation. When Filed, Title Vests: When payments have been made and the

bond given, if the plaintiff elects to give one, as required by the last two Sections, the court must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.

1887 R. S. Sec. 5225.

EMINENT DOMAIN: Order of judge putting plaintiff in possession of lands pending proceedings for their condemnation is void.—*Coburn v. Goodall*, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75.

Party procuring order for condemnation of private property to public use can not, without complying at all with the requirements of the proceedings,

which are of service to the owner, lay by for four years, and then without notice give effect to the previous and initiary acts through which he derails his title. One must show strict compliance with the statutory rules from which his title accrues.—*Bensley v. Mountain Lake Water Co.* 13 Cal. 306, 73 Am. Dec. 575.

Section 3857. Putting Plaintiff in Possession: At any time after trial and judgment entered or pending on appeal from the judgment to the supreme court, whenever the plaintiff shall have paid into the court for the defendant, the full amount of the judgment, and such further sum as shall be required by the court as a fund to pay any further damages and costs that may be recovered in said proceedings as well as all damages that may be sustained by the defendant, if for any cause the property shall not be finally taken for public use, the district court in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff if already in possession to continue therein, and if not, to take possession of and use the property during the conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof.

The defendant who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court or the judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him, to be delivered to him upon his filing a satisfaction of the judgment or upon his filing a receipt therefor and an abandonment of all defenses to the action or proceeding except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant as aforesaid shall be held to be an abandonment by such defendant of all defenses interposed by him excepting his claim for greater compensation. The court may order the money to be deposited in the county treasury, and in such case it shall be the duty of the treasurer to receive all such moneys, duly receipt for, and safely keep the same and to pay out such moneys in such manner, and at such times as the court or judge thereof may direct, and for such duty he shall be liable to the plaintiff on his official bond. *Provided, further,* That at any time after the commencement of proceedings, in the district court, as provided for in this Chapter, to condemn

property and upon ten days' notice to the adverse party, the district court or the judge thereof, may appoint three disinterested persons, who shall be residents of the county in which the land is situated as commissioners to assess and determine the damages that the defendant will sustain by reason of the condemnation and appropriation of the property described in the complaint, and the said commissioners shall, before entering upon the discharge of their duties, take and subscribe an oath to faithfully and impartially discharge their duties as such commissioners. Such commissioners shall give in writing at least five days' notice of the time and place where they will meet for the purpose aforesaid, which place, unless agreed upon between the two parties, shall be within five miles of the premises aforesaid; at the time and place mentioned in such notice they may administer oaths to witnesses, and hear the evidence offered by the parties, and after viewing the premises shall report in writing their proceedings and the damages which they find the defendant will sustain by reason of the condemnation and appropriation of said property, which report shall be signed by said commissioners, or a majority thereof, and be filed in the office of the clerk of the district court in which such action shall be pending; and at any time after payment to the defendant of the amount so assessed and found by said commissioners as damages, or in case the defendant shall refuse to receive the same, then at any time after such amount shall be deposited with the clerk of said court to abide the result of said action, the plaintiff may enter upon and take possession of and use the property mentioned in the complaint, until the final conclusion of the litigation concerning the same. *Provided, further,* That at the time of making such payment to the defendant of the amount so assessed and found by said commissioners as damages, or in case the defendant shall refuse to receive the same, then at any time after such amount shall be deposited with the clerk of said court to abide the result of said action, the plaintiff may elect to build the fences, cattle guards and other structures by said commissioners found to be necessary; and may execute to the defendants a bond as provided in Section 3854.

1887 R. S. Sec. 5226, amended 15th Sess. p. 13.

Section 3858. Costs Allowed, Distribution Thereof:

Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court.

1887 R. S. Sec. 5227.

Section 3859. Provisions Applicable to Proceedings Under this Chapter: Except as otherwise provided in this Chapter, the provisions of this Code relative to civil actions and new trials and appeals, are applicable to and constitute the rules of practice in the proceedings in this Chapter.

1887 R. S. Sec. 5228.

Section 3860. Exceptions: Nothing in this Code must be

construed to abrogate or repeal any statute providing for the taking of property in any city or town for street purposes.

1887 R. S. Sec. 5229.

RIGHTS OF WAY FOR THE DEVELOPMENT OF MINES.

Section 3861. Action for Right of Way. Petition:

When the owner, claimant, or occupant of any mine or mining claim desires to work the same, and it is necessary to enable him to do so successfully and conveniently, that he have a right of way for any of the purposes mentioned in Sections 2572 and 2573 of the Civil Code, if such right of way cannot be acquired by agreement with the claimant or owner of the lands or claims over, under, through, across or upon which he seeks to acquire such right of way, he may commence an action in the district court in and for the county in which such right of way, or some part thereof, is situated, by filing a verified complaint containing a particular description of the character and extent of the right sought, a description of the mine or claim of the plaintiff, and of the mine or claim and lands to be affected by such right of way or privilege, with the name of the occupant or owner thereof. He may also set forth any tender of compensation that he may have made, and demand the relief sought.

1887 R. S. Sec. 3132, amended 1899, 5th Ses. p. 350.

Section 3862. Summons, Insurance and Service:

Upon the filing of such complaint the clerk must issue a summons as provided in other civil actions, and the same must be served in the manner prescribed by law for service in ordinary actions.

1887 R. S. Sec. 3133, amended 1899, 5th Ses. p. 351.

Section 3863. Hearing. Commissioners. Trial: At any time after the service of the summons the plaintiff may upon ten days notice to the defendant apply to the district court or the judge thereof for the appointment of commissioners, to assess the damages resulting from the grant of such right of way. If upon the hearing of such motion, and the affidavit and proofs offered by the respective parties, the judge shall be of the opinion that the plaintiff has made a prima facie case entitling him to the relief demanded in the complaint, or any part thereof, he shall appoint three commissioners, who must be disinterested persons, residents of the county, to assess the damages resulting to the claims, mines, or lands of defendant. But if such commissioners are not applied for and appointed, or their award is not approved by the judge or court, or if an appeal is taken from their award as hereinafter provided, the action shall be tried and determined by the court, and the provisions of the Code of Civil Procedure applicable thereto shall govern the proceedings therein as in other civil actions; either party shall be entitled to a jury trial and may move for a new trial and appeal as in other cases.

1887 R. S. Sec. 3134, amended 1899, 5th Ses. p. 351.

Section 3864. Oath, Report: The commissioners so appointed must be sworn to faithfully and impartially discharge their duties, and must proceed without unreasonable delay to examine the premises and assess the damages resulting from such right or privilege prayed for, and report the amount of the same to the judge appointing them, and if such right of way affects the property of more than one person or company, such report must contain an assessment of damages to each company or person.

1887 R. S. Sec. 3135.

Section 3865. Report when Set Aside: For good cause shown, the judge may set aside the report of such commissioners, and appoint three other commissioners whose duty shall be the same as above mentioned.

1887 R. S. Sec. 3136.

Section 3866. Rights upon Payment or Tender: Upon the payment of the sum assessed as damages as aforesaid, to the persons to whom it is awarded, or a tender thereof to them, then the person petitioning as aforesaid, is entitled to the right of way prayed for in his petition, and may immediately proceed to occupy the same and erect thereon such works and structures, and make therein such excavations as may be necessary to the use and enjoyment of the right of way so awarded.

1887 R. S. Sec. 3137.

Section 3867. Appeal: Appeals from the assessment of damages made by the commissioners, may be made and prosecuted in the proper district court by any party interested, at any time within ten days after the filing of the report of the commissioners. A written notice of such appeal must be served upon the appellee in the same manner as summons are served in civil actions. The appellant must file with the clerk of the court to which the appeal is made, a bond of the sureties to be approved by the clerk in the amount of the assessment appealed from in favor of the appellee, conditioned that the appellant will pay any costs that may be awarded to the appellee, and abide any judgment that may be rendered in the cause.

1887 R. S. Sec. 3138.

Section 3868. Trial on Appeal: An appeal brings before the district court the necessity of the right of way or easement for the successful and convenient working of the mining claim and the amount of damages; and upon such appeal the case must be tried anew, and either party is entitled to a jury.

1887 R. S. Sec. 3139.

Section 3869. Rights Pending Appeal: The prosecution of an appeal from the award of the commissioners or from the judgment of the district court does not hinder, delay or prevent the plaintiff from exercising all the rights and privileges granted by the

award or judgment, if he deposit with the clerk of the district court the full amount of the damages awarded or adjudged the defendant and execute and deliver to the clerk a bond with sufficient sureties to be approved by the clerk, in an amount to be fixed by the judge of the district court, conditioned to pay to the defendant any additional amount, over and above the amount so deposited, that defendant may recover, and all costs to which he may be entitled under the provisions of this Chapter. At any time after such deposit and before the final determination of the action the defendant may, upon demand, receive from the clerk the amount so deposited, but his acceptance of the same, or any part thereof, shall bar any further prosecution of the appeal and shall be deemed an acquiescence and consent to the award and judgment, and the defendant shall not be entitled to any costs subsequent to the deposit.

1887 R. S. Sec. 3140, amended 1899, 5th Ses. p. 351.

Section 3870. Costs on Appeal: If the defendant recover judgment against the necessity of the easement, or for fifty dollars more damages than the plaintiff has tendered him as provided in the next Section, or for fifty dollars more damages than the commissioners or judgment of the district court awarded him, he shall recover the costs of the appeal, otherwise he must pay all such costs.

1887 R. S. Sec. 3141, amended 1899, 5th Ses. p. 351.

Section 3871. Costs: The cost and expenses of proceedings under the provisions of this subdivision, except as herein otherwise provided, must be paid by the party making the application; provided, that if the applicant before the commencement of such proceedings, has tendered to the parties owning or occupying the lands or mining claims, a sum equal to or more than the amount of damages recovered, all of the costs and expenses must be paid by the party or parties owning the lands or claims affected by such right of way, and who appeared and resisted the claim of the applicants thereto.

1887 R. S. Sec. 3142.

CHAPTER CLXXX.

CHANGE OF NAMES.

Section.

3872. Jurisdiction.

3873. Application for change of name of corporation.

Section.

3874. Publication of petition for.

3875. Hearing of application and remonstrance.

Section 3872. Jurisdiction: Application for change of names must be heard and determined by the district courts.

1887 R. S. Sec. 5245.

Section 3873. Application for Change of Name of Corporation: All applications for change of names must be made to the district court of the county where the person whose name is proposed to be changed resides, by petition, signed by such person;

and if such person is under twenty-one years of age, if a male, and under the age of eighteen years, if a female, by one of the parents, if living; or if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend. The petition must specify the place of birth and residence of such person, his or her present name, the name proposed, and the reason for such change of name, and must, if the father of such person be not living, name, as far as known to the petitioner, the near relatives of such person, and their place of residence. Any religious, benevolent, literary, or scientific corporation, or any corporation bearing or having for its name, or using or being known by the name of any benevolent or charitable order, or society, may by petition, apply to the district court of the county in which the property of said corporation is situated, for a change of its corporate name. Such petition must be signed by the trustees of the corporation, or by a majority of them, and must specify the date of the formation of the corporation, its present name, the name proposed, and the reason for such change of name. Upon filing such petition on behalf of such corporation, the same proceedings must be had as upon applications for changes of names of natural persons.

1887 R. S. Sec. 5246.

Section 3874. Publication of Petition for: A copy of such petition must be published for four successive weeks, in some newspaper printed in the county, if a newspaper be printed therein, but if no newspaper be printed in the county, a copy of such petition must be posted at three of the most public places in the county for a like period, and proofs must be made of such publication before the petition can be considered.

1887 R. S. Sec. 5247.

Section 3875. Hearing of Application and Remonstrance: Such application must be heard at such time during term as the court may appoint, and objections may be filed by any person who can, in such objections, show to the court, good reason against such change of name. On the hearing the court may examine, upon oath, any of the petitioners, remonstrants, or other persons, touching the application, and may make an order changing the name or dismissing the application, as to the court may seem right and proper.

1887 R. S. Sec. 5248.

CHAPTER CLXXXI.

ARBITRATIONS.

Section.

- 3876. What submitted to arbitration.
- 3877. Submission to arbitration to be in writing.
- 3878. Submission entered as an order of court. Revocation.
- 3879. Powers of arbitrators.
- 3880. Majority of arbitrators determine questions. Must be sworn.

Section.

- 3881. Award to be in writing. When judgment entered.
- 3882. Award may be vacated in certain cases.
- 3883. Court may, on motion, modify the award.

Section.

3884. Decision on motion, subject to appeal.

Section.

3885. If submission revoked and action brought, what recovered.

Section 3876. What Submitted to Arbitration: Persons capable of contracting may submit to arbitration any controversy which might be the subject of civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.

1887 R. S. Sec. 5260.

Section 3877. Submission to Arbitration to be in Writing: The submission to arbitration must be in writing, and may be to one or more persons.

1887 R. S. Sec. 5261.

Section 3878. Submission Entered as an Order of Court. Revocation: It may be stipulated in the submission, that it be entered as an order of the district court, for which purpose it must be filed with the clerk of said court for a county where the parties, or one of them reside. The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award must be made. When so entered, the submission cannot be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment. If the submission is not made an order of the court, it may be revoked at any time before the award is made.

1887 R. S. Sec. 5262.

Section 3879. Powers of Arbitrators: Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon.

1887 R. S. Sec. 5263.

Section 3880. Majority of Arbitrators Determine Questions. Must be Sworn: All the arbitrators must meet and act together during the investigation; but when met, a majority may determine any question. Before acting they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.

1887 R. S. Sec. 5264.

Section 3881. Award to be in Writing. When Judgment Entered: The award must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award must be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon

the application of a party and on filing of an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment.

1887 R. S. Sec. 5265.

Section 3882. Award may be Vacated in Certain Cases: The court on motion may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1. That it was procured by corruption or fraud;
2. That the arbitrators were guilty of misconduct or committed gross error in refusing on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced;
3. That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted to consider a part of the matters submitted to them; or that the award is indefinite or cannot be performed.

1887 R. S. Sec. 5266.

Awards will be set aside for fraud, mistake, or accident, in equity, in the absence of statutes. Also for mistake of law appearing on its face, in the reasons given by the arbitrators for their findings; although in case of a general finding, mistakes will not be inquired into by evidence aliunde.

Damages for remote and speculative loss of profits can not be allowed, and an award rendered upon such basis will be set aside.

Jurisdiction of courts can not be divested by agreements of parties, and where parties have stipulated not to ap-

peal, courts of equity may interfere, in the absence of statutes, to correct fraud or mistake appearing on the face of the record.

Award may be set aside on motion, the judgment thereon being in fieri at the time of making the motion.

Award may be sustained in part and set aside in part, where portions of it only are bad for mistake, and the award is not attacked on the ground of fraud, and the subject matter is in its nature divisible.—*Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313; *Hartford Fire Ins. Co. v. Bonner Mercantile Co.* 44 Fed. Rep. 151, 11 L. R. A. 623, and note.

Section 3883. Court may, on Motion, Modify the Award: The court may, on motion, modify or correct the award where it appears:

1. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein;
2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted;
3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

1887 R. S. Sec. 5267.

Section 3884. Decision on Motion, Subject to Appeal: The decision upon either motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action;

but the judgment, if entered before a motion made, cannot be subject to appeal.

1887 R. S. Sec. 5268.

Section 3885. It Submission Revoked and Action Brought, what Recovered: If a submission to arbitration be revoked, and an action brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration.

1887 R. S. Sec. 5269.

Appealable orders: Sec. 3573.

CHAPTER CLXXXII.

SOLE TRADERS.

Section.

3886. Who may become sole traders.

3887. Notice, how given and what to contain.

3888. Petition, what to contain.

3889. Amount of capital limited.

3890. Who may oppose it and how.

3891. Trial or hearing.

3892. Decree, what it must be.

Section.

3893. Oath, copy of order to be recorded.

3894. Rights and liabilities of sole traders.

3895. Sole trader must maintain her children.

3896. Husband of sole trader not liable for debts.

Section 3886. Who may Become Sole Traders: A married woman may become a sole trader by the judgment of the district court of the county in which she has resided for six months next preceding the application.

1887 R. S. Sec. 5850.

Section 3887. Notice, how Given and what to Contain: A person intending to make application to become a sole trader, must publish notice of such intention in a newspaper published in the county, or if none, then in a newspaper published in an adjoining county, for four successive weeks. The notice must specify the term, and the day upon which the application will be made, the nature and place of the business proposed to be conducted by her, and the name of her husband.

1887 R. S. Sec. 5851.

Section 3888. Petition, what to Contain: Ten days prior to the day named in the notice, the applicant must file a verified petition, setting forth:

1. That the application is made in good faith, to enable the applicant to support herself, or herself and others dependent upon her, giving their names and relation;

2. The fact of insufficient support from her husband, and the causes thereof, if known;

3. Any other grounds of application which are good causes for a divorce, with the reason why a divorce is not sought; and,

4. The nature of the business proposed to be conducted, and the capital to be invested therein, if any, and the sources from which it is derived.

1887 R. S. Sec. 5852.

Section 3889. Amount of Capital Limited: The applicant may invest in the business proposed to be, a sum derived from the community property, or of the separate property of the husband, not exceeding five hundred dollars.

1887 R. S. Sec. 5853.

Section 3890. Who may Oppose it and how: Any creditor of the husband may oppose the application, by filing in the court (prior to the day named in the notice) a written opposition verified, containing either;

1. A specified denial of the truth of any material allegation of the petition; or setting forth,

2. That the application is made for the purpose of defrauding the opponent; or,

3. That the application is made to prevent, or will prevent, him from collecting his debt.

1887 R. S. Sec. 5854.

Section 3891. Trial or Hearing: On the day named in the notice, or on such other day to which the hearing may be postponed by the court, the applicant must make proof of publication of the notice hereinbefore required, and the issues of fact joined, if any, must be tried as in other cases; if no issues are joined, the court must hear the proofs of the applicant, and find the facts in accordance therewith.

1887 R. S. Sec. 5855.

Section 3892. Decree what it must be: If the facts found sustain the petition, the court must render judgment, authorizing the applicant to carry on in her own name and on her own account, the business specified in the notice and petition.

1887 R. S. Sec. 5856.

Section 3893. Oath, Copy of Order to be Recorded: The sole trader must make, and file with the clerk of the court, an affidavit, in the following form: "I, A. B., do, in the presence of Almighty God, solemnly swear that this application was made in good faith, for the purpose of enabling me to support myself (and any dependant, such as husband, parent, sister, child, or the like, naming them, if any), and not with any view to defraud, delay or hinder any creditor, or creditors of my husband; and that, of the moneys so to be used by me in business, not more than five hundred dollars have come, either directly or indirectly, from my husband. So help me God."

A certified copy of the decree, with this oath indorsed thereon, must be recorded in the office of the recorder of the county where the business is to be carried on, in a book to be kept for such purpose.

1887 R. S. Sec. 5857.

Section 3894. Rights and Liabilities of Sole Traders: When the judgment is made and entered, and a copy thereof, with the affidavit provided for in the last section duly re-

corded, the person therein named is entitled to carry on the business specified, in her own name, and the property, revenues, moneys, and credits so by her invested, and the profits thereof, belong exclusively to her, and are not liable for any debts of her husband; and she thereafter has all the privileges of and is liable to all legal processes provided for debtors and creditors, and may sue and be sued alone, without being joined with her husband; *Provided, however,* That she shall not be at liberty to carry on said business in any other county than that named in the published notice, until she has recorded in such other county a copy of said judgment and affidavit.

1887 R. S. Sec. 5858.

Cited in the case of *Dernham v. Rowley* (Idaho), 44 Pac. 643, to the point that Section 3220 R. S. does not confer upon married women the right to make

all contracts that might be made by a feme sole.

Sole traders may acquire property by purchase the same as a feme sole.—*Alverson v. Jones*, 10 Cal. 9, 70 Am. Dec. 689, and note.

Section 3895. Sole Trader must Maintain Her Children: A married woman who is adjudged a sole trader is responsible and liable for the maintenance of her minor children.

1887 R. S. Sec. 5859.

Section 3896. Husband of Sole Trader not Liable for Debts: The husband of a sole trader is not liable for any debts contracted by her in the course of her sole trader's business, unless contracted upon his written consent.

1887 R. S. Sec. 5860.

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PRELIMINARY PROVISIONS.

Section 3897. Relief Provided; other Assignments

Void: Every insolvent debtor may, upon compliance with the provisions of this Chapter, be discharged from his debts and liabilities.

No assignment of any insolvent debtor, otherwise than as provided in this Chapter, is legal or binding on creditors.

1887 R. S. Secs. 5875 and 5932.

The insolvency laws of Idaho have no extra territorial operation, and the promissory notes of a resident owned by a non-resident are not barred by the discharge of such resident in an insolvency proceeding, unless such non-resident voluntarily becomes a party to such proceedings, and thus submits himself to the jurisdiction of the laws of the state where such insolvency proceedings are had.—*Security Savings & Trust Co. v. Rogers* (Idaho), 57 Pac. 316.

Promissory notes held as collateral security, duly assigned to a non-resident before maturity, and for a valid consideration, are not barred by the discharge in insolvency of the maker of such notes, if the holder thereof has not voluntarily submitted himself to the

jurisdiction of the laws of the state where such discharge was granted.—*Security Savings & Trust Co. v. Rogers* (Idaho), 57 Pac. 316.

CONFLICT OF LAWS, ASSIGNMENT FOR BENEFIT OF CREDITORS: An assignment by a non-resident, made in accordance with the laws of his domicile, and providing for preference, is invalid, as to property situate in Idaho, as against attaching creditors under Rev. St. Sec. 5875 and 5932.

It is immaterial that the attaching creditor is also a non-resident. *Berry, J. dissenting.*—*Barnatt v. Kinney*, 2 Idaho, 706, 23 Pac. 922, and 24 Pac. 624.

As to effect of the federal bankruptcy law on insolvent proceedings under state laws.—See note 45 L. R. A. 177-196.

Section 3898. Commencement of Proceedings: The filing of the petition upon which an order of adjudication in insolvency may be made, shall be deemed to be the commencement of proceedings in insolvency under this Chapter.

1887 R. S. Sec. 5925.

PETITION, ORDER, NOTICE, ELECTION, APPOINTMENT AND QUALIFICATION OF ASSIGNEE.

Section 3899. Petition: An insolvent debtor, owing debts exceeding in amount the sum of three hundred dollars, may apply

by petition to the district court of the county, in which he has resided for six months next preceding the filing of his petition, to be discharged from his debts and liabilities. In his petition he must set forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts and liabilities, and must annex thereto a schedule and inventory, and valuation, in compliance with the provisions of this Chapter. The filing of such petition is an act of insolvency, and thereupon such petitioner must be adjudged an insolvent debtor.

1887 R. S. Sec. 5876.

Section 3900. Schedule: Said schedule must contain a full and true statement of all his debts and liabilities, exhibiting, to the best of his knowledge and belief, to whom said debts or liabilities are due, the place of residence of his creditors, and the sum due to each; the nature of the indebtedness or demand, whether founded on written security, obligation, contract or otherwise; the true cause and consideration thereof, and the time and place when and where said indebtedness accrued, and a statement of any existing pledge, lien, mortgage, judgment, or other security for the payment of the same.

1887 R. S. Sec. 5877.

A petition of insolvency should show the date of the debts, as those which exist prior to the passage of the in-

solvent debtors' act are not affected by it.—Goodell v. His Creditors, 1 Idaho, 215.

Section 3901. Inventory: Said inventory must contain an accurate description of all the estate, both real and personal, of the petitioner, including his homestead, if any, and all property exempt by law from execution, and where the same is situated, and all incumbrances thereon.

1887 R. S. Sec. 5878.

Section 3902. Affidavit: The petition, schedule, and inventory must be verified by the affidavit of the petitioner, annexed thereto, and must be in form substantially as follows:

I,; do solemnly swear that the schedule and inventory now delivered by me contain a full, perfect and true discovery of all the estate, real, personal and mixed goods and effects, to me in any way belonging; all such debts as are to me owing, or to any person or persons in trust for me, and all securities and contracts, and contracts whereby any money may hereafter become payable, or any benefit or advantage accrue to me or to my use, or to any other person or persons in trust for me; that I have no lands, money, stock or estate, reversion or expectancy, beside that set forth in my schedule and inventory; that I have in no instance created or acknowledged a debt for a greater sum than I honestly and truly owe; that I have not, directly or indirectly, sold or otherwise disposed of or concealed, any part of my property, effects or contracts; that I have not, in contemplation of insolvency, in any way com-

pounded with my creditors whereby to secure the same, or to receive, or to expect any profit or advantage therefrom, or to defraud or deceive any creditor to whom I am indebted in any manner. So help me God.

1887 R. S. Sec. 5879.

Section 3903. Order Transferring Property. Stay of Proceedings: Upon receiving and filing such petition, schedule and inventory, the court, or the judge thereof, must make an order declaring the petitioner insolvent, and directing the sheriff of the county to take possession of all the estate, real and personal, of the debtor, except such as may be by law exempt from execution, and of all his deeds, vouchers, books of account and papers, and to keep the same safely until the appointment of an assignee. Such order must further forbid the payment of any debts and the delivery of any property belonging to such debtor, to him or for his use, and the transfer of any property by him, and must further appoint a time and place, in open court or at chambers, for a meeting of the creditors to prove their debts and choose an assignee of the estate, which must not be less than thirty days after the making of said order, and shall designate a newspaper or newspapers of general circulation in which publication thereof must be made. Upon the granting of said order, all proceedings against the said insolvent are stayed.

1887 R. S. Sec. 5880, amended 1899, 5th Ses. p. 250; 1895, 3d Ses. p. 76.

Cited in *Gaffney v. Piper* (Idaho), 44 Pac. 552.

The commencement of insolvency proceedings does not discharge a chattel mortgage on unplanted crops.—*Hall v. Glass*, 123 Cal. 500, 56 Pac. 336, 69 Am. St. Rep. 77.

Property vests in assignee by relation. As to control of insolvent's property, see *Taffts v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610.

The bond of an assignee in insolvency is for the protection of creditors only.—*Best v. Johnson*, 78 Cal. 217, 20 Pac. 415, 12 Am. St. Rep. 41.

Section 3904. Publication: A copy of said order must immediately be published by the clerk of said court, in the newspaper or newspapers designated therein, as often as the newspaper is printed before the meeting of creditors, and be served by the clerk forthwith by United States mail, postage prepaid, or personally, on all creditors named in the schedule. The order of adjudication must direct the publication thereof in a newspaper published in the county in which the petition is filed, if there be one, and if there be none, in a newspaper published nearest to such county; *Provided*, That no order of adjudication must be entered unless there first be deposited with the clerk in addition to the usual cost of commencing said proceedings, a sum of money sufficient to defray the cost of the publications ordered by the court, and ten cents for each copy to be mailed to, or served on, the creditors, which latter sum is hereby constituted the legal fee of the clerk for the mailing or service required in this Section.

1887 R. S. Sec. 5881.

Section 3905. Election of Assignee; Bond: At the time and place appointed for the meeting of the creditors to prove their

debts and choose an assignee, those having proven their claims, by filing a verified statement showing the amount, nature and security, if any, must proceed to the election of one assignee. The assignee must be a resident of the county where the insolvent resides, or where he has carried on his business. In electing an assignee, the opinion of the majority in amount of claim must prevail. If the meeting of the creditors is held in open court the clerk of the court must keep a minute of the deliberations of the creditors, and of the election and appointment of the assignee. If the meeting be at chambers, the judge must certify the result of the deliberations of the creditors, and of the election and appointment of the assignee, and shall file said certificate with the clerk of the court. The assignee must file, within five days, unless the time be extended by the court or judge, with the clerk, a bond, in an amount to be fixed by the court, or judge, with two or more sufficient sureties to be approved by the court or judge, and conditioned for the faithful performance of the duties devolving upon him. The bond is not void upon the first recovery, but may be sued upon from time to time by any creditor aggrieved, in his own name, until the whole penalty is exhausted. The sureties on such bond may be required to justify upon the application of any party interested, in the same manner as bail upon arrest in civil cases.

1887 R. S. Sec. 5882, amended 1899, 5th Ses. p. 250; 1895, 3d Ses. p. 76.

Proceedings by sureties to secure release and for the giving of new bonds and undertakings: Sec. 3753.

Accessory claim could not be taken for a Provisions for the protection of sureties by the deposit of funds in bank: Sec. 3754.

Provisions for reimbursement for premiums in guaranty surety companies: Sec. 3755.

In involuntary bankruptcy under the laws of this state the election of an assignee by a majority in amount of the claims proven must prevail, and it is error for the court to disregard their action, and appoint an assignee of its own selecting.—*Gaffney v. Piper*. (Idaho), 44 Pac. 552.

Note: Liability of sureties on assignee's bond.—See *First Nat'l Bank of Moscow v. Martin* (Idaho), 55 Pac. 302.

Section 3906. Assignee, when Appointed: If, on the day appointed for the meeting, the creditors do not attend, or refuse to elect an assignee, or if after election, the assignee fails to qualify within the proper time, the court or judge, before whom the said meeting takes place, may appoint an assignee and fix the amount of his bond.

1887 R. S. Sec. 5883.

ASSIGNMENT, ASSIGNEE'S POWER AND DUTIES.

Section 3907. Assignment: As soon as the assignee is appointed and qualified, the clerk of the court must, by an instrument under his hand and seal of the court, assign and convey to the assignee all the estate, real and personal, of the debtor, with all his deeds, books, and papers relating thereto, and such assignment relates back to the commencement of the proceedings in insolvency, and by operation of law vests the title to all such property and estate, both real and personal, in the assignee. Such assignment vests in the assignee all the estate of the insolvent debtor not exempt

by law from execution, subject to the lawful and bona fide liens and incumbrances thereon.

1887 R. S. Sec. 5884.

Section 3908. Authority of Assignee: The assignee has the right to recover all estate, debts and effects of said insolvent. If, at the time of the commencement of proceedings in insolvency, an action is pending in the name of the debtor, for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee must be allowed and admitted to prosecute the action in like manner and with like effect as if it had been originally commenced by him. In suits prosecuted by the assignee, a certified copy of the assignment made to him is conclusive evidence of his authority to sue.

1887 R. S. Sec. 5885.

Section 3909. Recording Assignments: The assignee must within one month after the making of the assignment to him, cause the same to be recorded in every county within this State, where any lands owned by the debtor are situated and the record of such assignment, or a duly certified copy thereof, is conclusive evidence thereof in all courts.

1887 R. S. Sec. 5886.

Section 3910. Resignation of Assignee: Any assignee may at any time, by writing filed in court, resign his appointment, having first settled his accounts, and delivered up all the estate to such successor as the court or judge may appoint; *Provided*, That if in the discretion of the court or judge the circumstances of the case require it, upon good cause being shown, the court or judge may at any time before such settlement of account and delivery of the estate is completed, revoke the appointment of such assignee, and appoint another in his stead. The liability of the outgoing assignee, or of the sureties on his bond is not in any manner discharged, released or affected by such appointment of another in his stead.

1887 R. S. Sec. 5887.

Section 3911. Powers of Assignee: The assignee has power:

1. To sue in his own name, and recover all the estate, debts, and things in action, belonging or due to such debtor, and no set-off or counter claim must be allowed in any such suit for any debt, unless it was owing to such creditor by such debtor at the time of the adjudication of his insolvency;

2. To take into his possession all the estate of such debtor, except property exempt by law from execution, whether delivered to him or afterwards discovered, and all books, vouchers, evidences of indebtedness, and securities belonging to the same;

3. From time to time to sell at public auction all the estate, real and personal, vested in him as such assignee, as ordered by the court;

4. On such sales to execute the necessary conveyances and bills of sale;

5. To redeem all valid mortgages and conditional contracts, and all valid pledges of personal property, and to satisfy any judgments which may be an incumbrance on any property sold by him, or to sell such property subject to such mortgage, contracts, pledges, or judgments;

6. To settle all matters and accounts between such debtor and his debtors, subject to the approval of the court;

7. Under the order of the court appointing him, to compound with any person indebted to such debtor, and thereupon to discharge all demands against such person;

8. To have and recover from any person receiving a conveyance, gift, transfer, payment or assignment, made fraudulently or contrary to any provisions of this Chapter, the property thereby transferred or assigned, or in case a redelivery of the property cannot be had, to recover the value thereof, with damages for the detention.

1887 R. S. Sec. 5888.

—Adams v. Haskell, 6 Cal. 113, 65 Am.

Insolvency, powers of assignee. Dec. 491.

Power of court over funds of insolvent.

Section 3912. Delivery of Books and Papers: The insolvent must, either before or on the day appointed for the meeting of creditors, deliver to the court all the commercial or account books he may have kept, which books must be deposited in the clerk's office of said court.

Said insolvent must also deliver to the court, at the same time, all vouchers, notes, bonds, bills, securities, or other evidences of debt, in any manner relating to or having any bearing upon or connection with the property surrendered by said debtor, and all such papers or securities must be deposited in the clerk's office of said court, and the clerk must deliver them, together with the books of the insolvent, to the assignee who may be appointed.

1887 R. S. Sec. 5889.

EMBEZZLEMENT, CONCEALMENT, EXAMINATION OF DEBTOR.

Section 3913. Embezzlement: If any person, before the assignment is made, having notice of the commencement of proceedings in insolvency, embezzles or disposes of any of the moneys, goods, chattels, or effects of the insolvent, he is chargeable therewith, and liable to an action by the assignee for double the value of the property so embezzled or disposed of, to be recovered for the benefit of the estate.

1887 R. S. Sec. 5890.

Section 3914. Penalties, Persons Concealing Property of Debtor: The same penalties, forfeitures, and proceedings by citation, examination, and commitment apply on behalf of an assignee against persons suspected of having concealed, embezzled, conveyed away or disposed of any property of the debtor, or of having possession or knowledge of any deeds, conveyances, bonds, con-

tracts, or other writings which relate to any interest of the debtor in any real or personal estate, as provided in the case of the estates of deceased persons.

1887 R. S. Sec. 5891.

Section 3915. Examination of Debtor: The court or judge may, upon the application of the assignee, or of any creditor of the debtor or without any application before or after adjudication in insolvency, examine upon oath the debtor in relation to his property and his estate, and any person tendering or making proof of claims, may subpoena witnesses to give evidence relating to such matters. All examinations of witnesses must be had and depositions must be taken in accordance with and in the same manner as is provided by the Code of Civil Procedure.

1887 R. S. Sec. 5913.

tion 3933.—*Madison v. Piper* (Idaho), 53

Note: See annotations under Sec- Pac. 395.

COLLECTION OF CREDITS; SALE OF ASSETS.

Section 3916. Estate Converted into Money. Private Sale: The assignee must, as speedily as possible, convert the estate, real and personal, into money. He must keep a regular account of all moneys received by him as assignee, to which every creditor, or other person interested therein may, at all reasonable times, have access. No private sale of any property of the estate of an insolvent debtor is valid unless made under the order of the court upon a petition in writing, which must set forth the facts showing the sale to be necessary. If it appears that a private sale is for the best interests of the estate, the court or judge may order it to be made.

1887 R. S. Sec. 5892.

Section 3917. Sale of Perishable Property: When it appears to the satisfaction of the court or judge that the estate of the debtor, or any part thereof, is of a perishable nature, or is liable to deteriorate in value, or is disproportionately expensive to keep, the court or judge may order the same to be sold in such manner as may be deemed most expedient, under the direction of the sheriff or assignee, as the case may be, who must hold the funds received in place of the property sold until the further order of the court.

1887 R. S. Sec. 5893.

Section 3918. Outstanding Debts: Outstanding debts, or other property due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, may be sold and assigned in like manner as the remainder of the estate.

1887 R. S. Sec. 5894.

DEBTS AND DEMANDS AGAINST THE ESTATE.

Section 3919. All Debts may be Proved: All debts due and payable from the debtor at the time of the adjudication of

insolvency, and all debts then existing but not payable until a future time, a rebate of interest being made, when no interest is payable by the terms of the contract, may be proved against the estate of the debtor.

1887 R. S. Sec. 5904.

Section 3920. Proof of Demands for Tortious Acts:

All demands against the debtor for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts, to the amount of the value of the property so withheld, from the time of the conversion.

1887 R. S. Sec. 5905.

Section 3921. Proof Demands Against Debtor as Surety:

If the debtor is bound as indorser, surety, bail or guarantor, upon any bill, bond, note, or other specialty or contract, or for any debt of another person, and his liability has not become absolute until the adjudication of insolvency, the creditor may prove the same after such liability becomes fixed, and before the final dividend is declared.

1887 R. S. Sec. 5906.

Section 3922. Contingent Liabilities: In all cases of contingent debts, and contingent liabilities contracted by the debtor and not herein otherwise provided for, the creditor may make claim therefore and have his claim allowed, with the right to share in the dividends if the contingency happens before the order for the final dividend, or he may, at any time, apply to the court or judge to have the present value of the debtor liability ascertained and liquidated, which must be done in such manner as the court or judge may order, and must be allowed to prove for the amount so ascertained.

1887 R. S. Sec. 5907.

Section 3923. Person Liable for Debtor may Prove Debt:

Any person liable as bail, surety, or guarantor, or otherwise, for the debtor who has paid the debt, or any part thereof, in discharge of the whole, is entitled to prove such debt, or to stand in the place of the creditor, if he has proved the same, although such payments are made after the proceedings in insolvency were commenced; and any person so liable for the debtor, and who has not paid the whole of said debt, but is still liable for the same, or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same in the name of the creditor.

1887 R. S. Sec. 5908.

Section 3924. Rent and Installment Debts: Where the debtor is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove, for a proportionate part thereof up to the time of the insolvency, as if the same became due from day to day, and not at such fixed and stated periods.

1887 R. S. Sec. 5909.

Section 3925. Mutual Credits, Set-offs and Counter-Claims: In all cases of mutual debts and mutual credits between

the parties, the account between them must be stated, and one debt set off against the other, and the balance only allowed and paid. But no set-off or counter-claim must be allowed of a claim in its nature not provable against the estate, or in favor of any debtor to the insolvent of a claim purchased by or transferred to him after the filing of the petition, for the purpose of making such set-off or counterclaim.

1887 R. S. Sec. 5910.

Section 3926. Mortgages and Pledges Against Debtor:

When a creditor has a mortgage or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, he must be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court or judge may direct; or the creditor may release or convey his claim to the assignee, upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption thereon on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in either case the assignee and creditor respectively must execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, the creditor must not be allowed to prove any part of his debt.

1887 R. S. Sec. 5911.

In case of mortgaged property the assignee has the right of redemption, or may sell the property subject to the claim of the creditor.—*Madison v. Piper*, District Judge (Idaho), 53 Pac. 395.

A creditor of an insolvent debtor, whose claim was secured by mortgage, and had not been presented, proved and allowed in the insolvency proceeding, made application to have the debtor examined on oath in relation to a part of the property included in said mortgage. Thereupon a citation was issued,

and the debtor was examined, and the judge found that the debtor had disposed of a part of said property, and ordered the debtor to account to the mortgagee for the same. Held, that the judge had no jurisdiction to make such order.—*Madison v. Piper* (Idaho), 53 Pac. 395.

An insolvent, against whom an order is made, is the party beneficially interested in this case, and may make application for a writ of review, for the purpose of reviewing an order which the judge had no jurisdiction to make.—*Madison v. Piper* (Idaho), 53 Pac. 395.

Section 3927. Attachment Liens. Costs in Contested Matters:

When an attachment has been made and is not dissolved before the commencement of proceedings in insolvency, or is dissolved by an undertaking given by the defendant, if the claim upon which the attachment suit was commenced is proved against the estate of the debtor, the plaintiff may prove the legal costs and disbursements of the suit, and of the keeping of the property, and the amount thereof is a preferred debt.

1887 R. S. Sec. 5929, first part.

Section 3928. Creditor Proving Claims Waives Right of Action: No creditor proving his debt or claim must be allowed to maintain any suit at law or in equity therefor against the debtor,

but is deemed to have waived all right of action and suit against him, and all proceedings already commenced, are deemed to be discharged and surrendered thereby; *Provided*, That no valid lien existing in good faith thereunder is thereby affected; and, further provided, That a creditor proving his debt or claim is not held to have waived his right of action or suit against the debtor where a discharge is refused, or the proceedings are determined without a discharge.

1887 R. S. Sec. 5912.

ACCOUNTS, REPORT, DISTRIBUTION, DISCHARGE OF ASSIGNEE.

Section 3929. Accounts of Assignee: At the expiration of three months from the appointment of the assignee in any case, or as much earlier as the judge may direct, the assignee must exhibit to the judge and to the creditors, and file, just and true accounts of all his receipts and payments, verified by his oath, and a statement of the property outstanding, specifying the cause of its outstanding; also what debts or claims are yet undetermined, and stating what sum remains in his possession, and thereupon a dividend must be made, unless for cause the court or judge otherwise order. Thereafter, further accounts, statements, and dividends must be made in like manner as often as occasion requires.

1887 R. S. Sec. 5896.

Section 3930. Orders for Accounts and Distribution: The court or judge must at any time, upon the motion of any two or more creditors, require the assignee to file his account, and if he has funds subject to distribution, he must be required to distribute them without delay.

1887 R. S. Sec. 5897.

Section 3931. Discharge of Assignee: Should the assignee refuse or neglect to render his accounts, or to pay over a dividend when he has, in the opinion of the court or judge, sufficient funds for that purpose, the court or judge must immediately discharge such assignee from his trust, and appoint another in his place. The assignee so discharged must forthwith deliver over to the assignee appointed, all the funds, property, books, vouchers, or securities belonging to the insolvent, without charging or retaining any commission or compensation for his personal services.

1887 R. S. Sec. 5900.

In an action upon the bond of an assignee in bankruptcy, where the trial court finds that assets to the amount of \$2005 of the bankrupt's estate have been received by the assignee, that all the proceedings required by the statute have been followed up to enforce an

accounting by the assignee, but that such assignee has failed and neglected to account for such assets, a finding by the court that such failure on the part of the assignee constitutes a breach of the bond is not error.—First Nat. Bank of Moscow v. Martin (Idaho), 55 Pac. 302.

Section 3932. Final Account of Assignee: Preparatory to the final account and dividend, the assignee must submit his account to the court, and file the same, and must at the time of filing, accompany the same with an affidavit, that notice by mail has been given to all the creditors who have proved their claims; that he

will apply for a settlement of his account, and for a discharge from all liability as assignee at a time specified in such notice, which time must be not less than ten or more than twenty days from such filing. At the hearing, the court must audit the account, and any person interested may appear and file exceptions in writing, and contest the same. The court thereupon must settle the account and order a dividend of any portion of the estate remaining undistributed, and discharge the assignee, subject to compliance with the order of the court, from all liability as assignee to any creditor of the insolvent.

1887 R. S. Sec. 5901.

Section 3933. Creditors to Share Pro Rata: All creditors whose debts are duly proved and allowed are entitled to share in the property and estate pro rata, without priority or preference whatever, other than as provided in this Chapter; *Provided*, That any debt proved by any person liable as bail, surety, guarantor, or otherwise, for the debtor, must not be paid to the person so proving the same until satisfactory evidence is produced of the payment of such debt by such person so liable; and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

1887 R. S. Sec. 5898.

Claims for wages for service of employees, preferred: Sec. 3368.

The creditors of an insolvent bank are not entitled to share pro rata in public money deposited in such bank.—*State ex rel Anderson v. Thum (Idaho)*, 55 Pac. 858.

Public money deposited by a public officer in a bank becomes a trust fund, and not part of the estate of the bank; and in case of the insolvency of the bank its receiver must treat such fund as the property of the true owner, and not of the bank.—*State ex rel. Anderson v. Thum (Idaho)*, 55 Pac. 858.

Section 3934. Dividends not Disturbed for Subsequently Proved Debts: No dividend already declared, must be disturbed by reason of debts being subsequently proved, but the creditors proving such debts, are entitled to a dividend equal to those already received by the other creditors, before any further dividend is made to the latter; *Provided*, The failure to prove such claim has not resulted from the creditor's own neglect.

1887 R. S. Sec. 5899.

Section 3935. Expenses, Management of Property, Commissions: Assignees must be allowed all necessary expenses in the care, management, and settlement of the estate, and are collectively entitled to charge and receive for their services, commissions upon all sums of money coming to their hands and accounted for by them, as follows: For the first thousand dollars, at the rate of ten per cent; for all above that sum and not exceeding ten thousand dollars, at the rate of five per cent; and for all above that sum, at the rate of four per cent.

1887 R. S. Sec. 5895.

Costs incurred by the assignee of an insolvent estate, in proceedings in insolvency, for reasonable and necessary attorney's fees incurred in protecting the insolvent estate, should be allowed to the assignee, on his application, and

not to the attorney.—*In re Bank of Genesee (Idaho)*, 51 Pac. 406.

Orders allowing attorney's fees for services rendered the assignee of an insolvent debtor, which are made upon ex parte application of the attorney, by the district judge, either in open

court or at chambers, are in violation of the rights of the creditors, and unauthorized.—In re Bank of Genesee (Idaho), 51 Pac. 406.

DISCHARGE OF DEBTOR.

Section 3936. Petition for Discharge. Notice to Creditors: At any time after the expiration of three months from the adjudication of insolvency, the debtor may apply to the court or the judge thereof at chambers, for a discharge from his debt, and the court, or the judge thereof, either in open court, or in chambers, must thereupon order notice to be given to all creditors who have proved their debts, to appear on a day appointed for that purpose in open court, and show cause why a discharge should not be granted to the debtor; said notice must be given either by serving at least thirty days before the day set for the hearing, a copy thereof personally on each creditor who has proved his claim, or his attorney; or by the clerk of the court mailing to each of said creditors who have proved their claims, a copy of said notice properly addressed to each of said creditors at his place of residence or business, postage prepaid; which said notice must be mailed at least thirty days before the day set for the hearing, or if any creditor have an attorney, said notice may be served upon said attorney; *Provided*, That if no debts have been proved, such notice is not required.

1887 R. S. Sec. 5914, amended 1899, 5th Ses. p. 316, 1897, 4th Ses. p. 122.

Section 3937. Discharge, when not Granted: No discharge must be granted, or if granted is valid, if the debtor has sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in insolvency, in relation to any material fact concerning his estate, or his debts, or to any other material fact; or if he has concealed any part of his estate or effects, or any books or writings relating thereto; or if he has been guilty of fraud or willful neglect in the care, custody, or delivery to the assignee of the property belonging to him, at the time of the presentation of his petition and inventory excepting such property as he is permitted to retain under the provisions of this Chapter, or if he has caused or permitted any loss or destruction thereof; or if, within one month before the commencement of such proceedings, he has procured his lands, goods, money, or chattels to be attached, or seized on execution; or if he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document with intent to defraud his creditors; or if he has made any fraudulent gift, transfer, conveyance, or assignment of any part of his property, or has admitted a false or fictitious debt against his estate, or if, having knowledge that any person has proven such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or if, being a merchant or tradesman, he has not, subsequently to the passage of this Chapter, kept proper books of account; or if he or any any other person on his account, or in his

behalf, has influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation; or if he has, in contemplation of becoming insolvent, made any pledge, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this chapter in satisfaction of his debts; or if he has been convicted of any misdemeanor under this chapter, or has been guilty of fraud contrary to the true intent of this chapter, or has received the benefits of this or any other act of insolvency or bankruptcy within three years next preceding his application for discharge, and before any discharge is granted, the debtor must take and subscribe an oath to the effect, that he has not done, suffered, or been privy to any act, matter or thing specified in this chapter, as ground for withdrawing such discharge or as invalidating such discharge if granted.

1887 R. S. Sec. 5915.

Section 3938. Opposition to Discharge: Any creditor opposing the discharge of a debtor, must file specifications, in writing, of the grounds of his opposition, and after the debtor has filed and served his answer thereto, which pleadings must be verified, the court must try the issue or issues raised, with or without a jury, according to the practice provided by law in civil cases.

1887 R. S. Sec. 5916.

Section 3939. Certificate of Discharge: If it appears to the court that the debtor has in all things conformed to his duty under this chapter, and that he is entitled, under the provisions thereof, to receive a discharge, the court must grant him a discharge from all his debts, except as hereinafter provided, and must give him a certificate thereof, under the seal of the court, in substance, as follows:

In the district court of the.....judicial district of Idaho State, in and for....county. Whereas,has been duly adjudged an insolvent under the insolvent laws of this state, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said.....be forever discharged from all debts and claims, which by said insolvent laws, are made provable against his estate, and which existed on the.....day of....., on which the petition for adjudication was filed by him, excepting such debts, if any, as are, by said insolvent laws, excepted from the operation of a discharge in insolvency.

Given under my hand, and the seal of the court, this.....day of, A. D. 19.... Attest,, clerk.

(Seal).

....., Judge.

1887 R. S. Sec. 5917.

Judgment against insolvent entered after granting of discharge is conclusive against him, if regularly obtained.—*Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

Assignment of right to complain of fraud committed on the assignor is contrary to public policy and void.—*Sanborn v. Doe*, 92 Cal. 152, 28 Pac. 105, 27 Am. St. Rep. 101.

Insolvent laws of one state cannot

discharge the contracts of citizens of other states, unless they voluntarily appear.—Scamman v. Bonslett, 118 Cal. 293, 62 Am. St. Rep. 226, 50 Pac. 272.

Section 3940. Fraudulent Debts not Discharged: No debt created by fraud or embezzlement of the debtor, or by his defalcations as a public officer, or while acting in a fiduciary character, and no indebtedness or liability for funds, deposits, or goods received as a banker, broker, commission merchant or factor, can be discharged under this chapter, but the debt may be proved and the dividend thereon is a payment on account of said debt; and no discharge granted under this chapter releases, discharges or affects any person liable for the same debt for or with the debtor, either as partner, joint contractor, indorser, surety or otherwise.

1887 R. S. Sec. 5918.

Section 3941. Effect and Operation of Discharge: A discharge duly granted under this chapter, with the exceptions aforesaid, releases the debtor from all claims, debts, liabilities and demands set forth in his schedule, or which were or might have been proved against his estate in insolvency, and may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting forth the same in full, and the same is a complete bar to all suits brought on any such debts, claims, liabilities or demands, and the certificate is prima facie evidence in favor of such fact, and of the regularity of such discharge: *Provided, however,* That any creditor of said debtor whose debt was proved, or provable, against the estate in insolvency, who sees fit to contest the validity of such discharge on the ground that it was fraudulently obtained, and who has discovered the facts constituting the fraud subsequent to the discharge, may, at any time within two years after the date thereof, apply to the court which granted it, to set aside and annul the same; or if the same is pleaded, the effect thereof may be avoided collaterally upon any such grounds.

1887 R. S. Sec. 5919.

Section 3942. Refusal of Discharge, Effect of: The refusal of a discharge to the debtor does not affect the administration and distribution of his estate under the provisions of this chapter.

1887 R. S. Sec. 5920.

PARTNERSHIP AND CORPORATION ASSIGNMENTS.

Section 3943. Insolvency of Partnerships: Two or more persons who are partners in business may be adjudged insolvent, either on the petition of such partners, or any of them, in which case an order must be issued in the manner provided by this chapter, upon which all the joint stock and property of the partnership, and also all the separate estate of each of the partners must be taken, excepting such parts thereof as may be exempt by law, and all the creditors of the company, and the separate creditors of each partner, may prove their respective debts; and the assignee must be chosen by the creditors of the co-partnership, and must keep separate ac-

counts of the joint stock or property of the co-partnership, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignee the whole amount of the expenses and disbursements, the net proceeds of the joint stock must be appropriated to pay the creditors of the co-partnership, and the net proceeds of the separate estate of each partner must be appropriated to pay his separate creditors; and if there is any balance of the separate estate of any partner after the payment of his separate debts, such balance must be added to the joint stock for the payment of the joint creditors, and if there is any balance of the joint stock after the payment of the joint debts, such balance must be divided and appropriated to and among the separate estate of the several partners according to their respective rights and interest therein, as it would have been if the partnership had been dissolved without insolvency; and the sum so appropriated to the separate estate of each partner must be applied to the payment of his separate debts, and the certificate of discharge must be granted or refused to each partner as the same would or ought to be if the proceedings had been by him alone under this Chapter; and in all other respects the proceedings as to partners must be conducted in the like manner as if they had been commenced and prosecuted by or against one person alone.

If such co-partners reside in different counties, that court in which the petition is first filed may retain exclusive jurisdiction over the case. If the petition be filed by less than all the partners of a co-partnership, those partners who do not join in the petition must be ordered to show cause why they should not be adjudged to be insolvent.

1887 R. S. Sec. 5902.

Section 3944. Applicable to Corporations: The provisions of this Chapter apply to corporations, and upon petition of any officer of any corporation duly authorized by the vote of the board of directors or trustees, at a meeting specially called for that purpose, or by the assent in writing of a majority of the directors or trustees, as the case may be, the like proceedings shall be had and taken as are provided in the case of individual debtors. All the provisions of this Chapter which apply to the debtor or set forth his duties, examination and liabilities, or prescribe penalties, or relate to fraudulent conveyances, payments and assignments, apply to each and every officer of any corporation in relation to the same matters concerning the corporation. Whenever any corporation is declared insolvent, all its property and assets must be distributed to the creditors; but no discharge can be granted to any corporation.

1887 R. S. Sec. 5903.

GENERAL PROVISIONS RELATING TO CLAIMS AND CREDITORS.

Section 3945. Statute of Limitations, not to Run: Pending proceedings by any person, co-partnership or corporation,

no statute of limitations runs against a claim which in its nature is provable against the estate of the debtor.

1887 R. S. Sec. 5922.

Section 3946. Representation by Attorney: Any creditor at any stage in the proceedings, may be represented by his attorney or duly authorized agent.

1887 R. S. Sec. 5923.

Section 3947. Receivers: A receiver may be appointed by the court or judge in which an insolvent proceeding is pending before the election of an assignee:

1. Upon the application of creditors, where it is shown that the property, or any portion thereof, is in danger of being lost, removed or materially injured;

2. In all other cases where receivers are appointed by the usage of the courts of equity. And thereupon the appointment, oath, undertaking and powers of such receiver are in all respects regulated by the general laws applicable to receivers.

1887 R. S. Sec. 5927.

General provisions relating to receivers: Chap. CXXXV.

The enactment of the Federal Bankruptcy Law of July 1, 1898, did not suspend the right of a state court to ap-

point a receiver for an insolvent corporation under state laws, when it had not been adjudged a bankrupt under the law of congress. —State v. Superior Court (Wash.), 45 L. R. A. 177 and note.

GENERAL PROVISIONS RELATING TO DEBTORS.

Section 3948. Death of Insolvent, Pending Proceedings: If any debtor dies after the order of adjudication, the proceedings may be continued and concluded in like manner and with like validity and effect as if he had lived.

1887 R. S. Sec. 5921.

Section 3949. Homesteads and Exemptions: It is the duty of the court or judge having jurisdiction of the proceedings, to exempt and set apart for the use and benefit of said insolvent, such real and personal property as is by law exempt from execution.

1887 R. S. Sec. 5924.

HOMESTEAD: Setting apart on insolvency proceedings.—In re Liggett, 117 Cal. 352, 49 Pac. 211, 59 Am. St. Rep. 190.

Partnership property, not exempt from execution, cannot be set apart in insolvency proceedings to co-partner.—Cowan v. Creditors, 77 Cal. 403, 19 Pac. 755, 11 Am. St. Rep. 294.

Section 3950. Dismissals and Discontinuances: The court or judge may, upon the application of the debtor, dismiss the petition and discontinue the proceedings at any time before the appointment of assignee. After the appointment of assignee no dismissal must be made without the consent of all parties interested in or affected thereby.

1887 R. S. Sec. 5930.

APPEALS.

Section 3951. Appeals: An appeal may be taken to the supreme court in the following cases:

1. Allowing or rejecting a creditor's claim, in whole or in part;
2. Overruling a motion for a new trial;
3. Settling an account of an assignee;
4. Against or in favor of setting apart homestead or other property claimed as exempt from execution;
5. Granting or refusing a discharge to the debtor. The notice, undertaking, and procedure on appeal must conform to the general laws of this State, regulating appeals in civil cases except that when the assignee has given an official undertaking and appeals from a judgment or order in insolvency his official undertaking stands in the place of an undertaking on appeal, and the sureties therein are liable on such undertaking.

1887 R. S. Sec. 5931.

MISCELLANEOUS PROVISIONS.

Section 3952. Contempts: All sections of the Code of Civil Procedure relating to contempts are hereby made applicable to all proceedings under this Chapter. An appeal is allowed to the supreme court from any order adjudging any person guilty of contempt of court.

1887 R. S. Sec. 5928.

General provisions relating to contempts: Chap. CLXXVII.

Section 3953. Costs: In all contested matters in insolvency the court may, in its discretion, award costs to either party, to be paid by the other, or to either or both parties, to be paid out of the estate as justice and equity may require. In awarding costs the court may issue execution therefor.

1887 R. S. Sec. 5929, last part.

Section 3954. Certain Words Defined: Words used in this Chapter in the singular, include the plural, and in the plural, the singular, and the word "debtor" includes partnerships and corporations.

1887 R. S. Sec. 5926.

CHAPTER CLXXXIV.

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CONFESSION OF JUDGMENT. WITHOUT ACTION.

Section 3955. May be for Debt due on Contingent Liability: A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this Chapter. Such judgment may be entered in any court having jurisdiction for like amounts.

1887 R. S. Sec. 5060.

Plaintiff brought action upon a usurious contract. Judgment was entered upon stipulations of parties in favor of plaintiff, from which defendant appealed. Held, that the judgment so entered, being a contravention of the usury laws of the state, the same was erroneous.—*Ocobock v. Nixon* (Idaho), 57 Pac. 309.

The general rule that, where judgment is entered upon the agreement and consent of parties, appeal will not lie, does not apply to a case where such agreement and judgment is in contra-

vention of the positive provisions of a statute.—*Ocobock v. Nixon* (Idaho), 57 Pac. 309.

Judgment confessed by an insolvent debtor in favor of a creditor, without his request or knowledge, and entered up at the instance of the debtor alone, and upon which execution is levied on the latter's property, to enable such creditor to obtain priority over other creditors, is null and void as to subsequent attaching creditors.—*Wilcoxon v. Burton*, 27 Cal. 228, 87 Am. Dec. 66 and note.

Section 3956. Statement in Writing and form Thereof: A statement in writing must be made, signed by the defendant and verified by his oath, to the following effect:

1. It must authorize the entry of judgment for a specified sum;
2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due or to become due;
3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

1887 R. S. Sec. 5061.

Judgment by confession entered in open court, and regularly signed by the judge, is not a nullity on its face because of defects in the statement of the facts out of which the indebtedness

arose. If the court had jurisdiction of the subject matter and of the parties, however irregular or erroneous it may be, it cannot be called in question in a collateral proceeding. It can only be attacked by the creditors of the de-

fendant, who are defrauded thereby, and in a direct proceeding for that purpose.—*Lee v. Figg*, 37 Cal. 328, 99 Am. Dec. 271.

Judgment by confession failing to set out all the facts required by the statute is *prima facie* fraudulent, but not

absolutely void; the presumption of fraud may be rebutted by proof that the judgment was fair, and for a bona fide debt.—*Richards v. McMillan*, 6 Cal. 419, 65 Am. Dec. 522. Strict compliance with the statute necessary. Note.—*Id.*

Section 3957. Filing Statement and Entering Judgment: The statement must be filed with the clerk of the court in which the judgment is to be entered, who must endorse upon it and enter in the judgment book, a judgment of such court for the amount confessed, with five dollars costs. The statement and affidavit with the judgment indorsed, thereupon becomes the judgment roll.

1887 R. S. Sec. 5062.

Where creditor attacks judgment by confession as being fraudulent as to him on the ground that the object of the debtor and of the judgment creditor was to assist the debtor in forcing a compromise with his other creditors rather than to have judgment enforced, he must plead this ground. A general averment in the complaint that the intent was to hinder, delay, and defraud

is insufficient, and will not put the adverse party on his defense.—*Meeker v. Harris*, 19 Cal. 278, 79 Am. Dec. 215.

Judgment by confession cannot be attacked for intervening errors at the instance of one not a party to the judgment, where it is rendered in open court, upon an allegation of indebtedness, and an appearance by the parties. *Cloud v. El Dorado County*, 12 Cal. 128, 73 Am. Dec. 526.

Section 3958. In Probate and Justices' Courts: In a probate or justices' court, where the court has the authority to enter the judgment, the statement may be filed with the court or justice, who must thereupon enter in his docket a judgment of his court for the amount confessed, with three dollars costs. If a transcript of such judgment be filed with the district clerk, a copy of the statement must be filed with it.

1887 R. S. Sec. 5063.

SUBMITTING CONTROVERSY WITHOUT ACTION.

Section 3959. Controversy, how Submitted without Action: Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought; but it must appear by affidavit, that the controversy is real and the proceedings in good faith, to determine the rights of the parties. The court must thereupon hear and determine the case and render judgment thereon, as if an action were depending.

1887 R. S. Sec. 5068.

JUDGMENT: Judgment in agreed cases must be such that final process may issue thereon when no appeal will

lie.—*Potter v. Talkington* (Idaho), 49 Pac. 14.

No person without his consent can be made a party to an agreed case.—*Potter v. Talkington* (Idaho), 59 Pac. 362.

Section 3960. Judgment as in Other Cases but Without Costs: Judgment must be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission and a copy of the judgment constitute the judgment roll.

1887 R. S. Sec. 5069.

Section 3961. Judgment, Enforcement or Appeal from: The judgment may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal.

1887 R. S. Sec. 5070.

DISCHARGE OF PERSONS IMPRISONED ON CIVIL PROCESS.

Section 3962. Persons Confined, how Discharged: Any person confined in jail on an execution issued on a judgment rendered in a civil action, must be discharged therefrom upon the conditions in this Chapter specified.

1887 R. S. Sec. 5075.

Section 3963. Notice of Application: Such person must cause a notice in writing to be given to the plaintiff, his agent or attorney, that at a certain time and place he will apply to the judge of the district court of the county in which such person may be confined; or, in case of his absence or inability to act, to the judge of the probate court of the county in which such person may be imprisoned, for the purpose of obtaining a discharge from his imprisonment.

1887 R. S. Sec. 5076.

Section 3964. Service of Notice: Such notice must be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application.

1887 R. S. Sec. 5077.

Section 3965. Examination before Judge: At the time and place specified in the notice, such person must be taken before such judge, who must examine him under oath concerning his estate, and property, and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed, or any part thereof, and such judge may also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor.

1887 R. S. Sec. 5078.

Section 3966. Interrogatories may be in Writing: The plaintiff in the action may, upon such examination, propose to the prisoner any interrogatories pertinent to the inquiry, and they must if required by him, be proposed and answered in writing and the answer must be signed and sworn to by the prisoner.

1887 R. S. Sec. 5079.

Section 3967. Oath to be Administered: If, upon the examination, the judge is satisfied that the prisoner is entitled to his discharge, he must administer to him the following oath, to-wit: "I, ————— do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with

design to secure the same to my use, or to hinder, delay, or defraud my creditors, so help me God."

1887 R. S. Sec. 5080.

Section 3968. Order of Discharge: After administering the oath the judge must issue an order that the prisoner be discharged from custody, and the officer upon the service of such order, must discharge the prisoner forthwith, if he be imprisoned for no other cause.

1887 R. S. Sec. 5081.

Section 3969. Prisoner may Again Apply, When: If such judge does not discharge the prisoner, he may apply for his discharge at the end of every succeeding thirty days, in the same manner as above provided and the same proceedings must thereupon be had.

1887 R. S. Sec. 5082.

Section 3970. Discharge Final : The prisoner after being so discharged, is forever exempt from arrest or imprisonment for the same debt, unless he be convicted of having willfully sworn falsely upon his examination before the judge, or in taking the oath before prescribed.

1887 R. S. Sec. 5083.

Section 3971. Judgment Remains in Force: The judgment against any prisoner who is discharged, remains in full force against any estate which may then or at any time afterward during the life of the judgment belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner in like manner as if he had never been committed.

1887 R. S. Sec. 5084.

Section 3972. Plaintiff may Order Discharge of Prisoner: The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action.

1887 R. S. Sec. 5085.

Section 3973. Plaintiff to Advance Funds. Support of Prisoner: Whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent or attorney must advance to the jailer on such commitment, sufficient money for the board of the prisoner at the rate provided by law, for one week, and must make the like advance for every successive week of his imprisonment; and in case of failure to do so, the jailer must forthwith discharge such prisoner from custody, and such discharge has the same effect as if made by order of the creditor.

1887 R. S. Sec. 5086.

POSSESSION OF LAND. FORCIBLE ENTRY AND DETAINER.

Section 3974. Forcible Entry Defined : Every person is guilty of a forcible entry who either ;

1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property; or,

2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession.

1887 R. S. Sec. 5091.

ACTION FOR FORCIBLE ENTRY AND DETAINER FOR LANDS WITHIN THE NEZ PERCE INDIAN RESERVATION: The plaintiff in this action was a trespasser upon the Nez Perce reservation without any right whatever to enter into contracts for the use and occupation of Indian lands reserved under treaty, and if he did make agreements concerning said land, the same could not be enforced in the courts of this territory, for the reason that the Indians had the sole right to use and occupy such land, or premises and the courts were bound to protect them in the same.—*Langford v. Monteith*, 1 Idaho, 612.

Possession of plaintiff is sufficient to maintain action for forcible entry on and detainer of lot 28 by 132 feet, where

the plaintiff has a stable on it, cultivates it, and lives upon the adjoining lot, even though the fence is not very substantial. Complete entry and possession is not effected and acquired until the possessor is expelled, and an exclusive lodgment effected by the invader. To determine whether entry is forcible, everything which transpired between the parties from the time of the coming in of one until the going out of the other may be considered. Party is not guilty of forcible entry who goes to a lot in another's possession accompanied by other persons, and builds a fence around it, while the former possessor is remonstrating, and removes him from the line of the fence where he places himself to prevent the fence from being built.—*Valencia v. Couch*, 32 Cal. 339, 91 Am. Dec. 589.

Section 3975. Forcible Detainer Defined: Every person is guilty of a forcible detainer who either:

1. By force, or by menaces and threats of violence, unlawfully holds and keeps possession of any real property, whether the same was acquired peacefully or otherwise; or,

2. Who, in the night time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant.

The occupant of real property, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in peaceable and undisturbed possession of such lands.

1887 R. S. Sec. 5092.

Section 3976. Unlawful Detainer Defined: A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

1. When he continues in possession, in person or by sub-tenant of the property, or any part thereof, after the expiration of the term for which it is let to him; without the permission of his landlord, or the successor in estate of his landlord, if any there be; but in a case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code;

2. Where he continues in possession, in person or by sub-tenant, without permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been

served upon him, and if there be a sub-tenant in actual occupation of the premises, also upon such sub-tenant. Such notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his term without any demand of possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord, or the successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year,

3. Where he continues in possession in person, or by sub-tenants, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there be a sub-tenant in actual occupation of the premises, also upon such sub-tenant. Within three days after the service of the notice, the tenant, or any sub-tenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease, or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture: *Provided*, If the covenants and conditions of the lease, violated by the lessee, cannot afterwards be performed, then no notice, as last prescribed herein, need be given to said lessee or his sub-tenant demanding the performance of the violated covenant or conditions of the lease. A tenant may take proceedings similar to those prescribed in this chapter, to obtain possession of premises let to an under-tenant, in case of his unlawful detention of the premises under-let to him.

4. A tenant or sub-tenant, assigning or sub-letting, or committing waste upon the demised premises, contrary to the covenants of his lease, thereby terminates the lease, and the landlord, or his successor in estate, shall, upon service of three days' notice to quit, upon the person or persons in possession, be entitled to restitution of possession of such demised premises under the provisions of this chapter.

1887 R. S. Sec. 5093.

Tenancy by implication, subject to covenants and conditions of the original lease, will arise where the lessee holds

over and the landlord receives rent after the expiration of the term.—*Blumenberg v. Myers*, 32 Cal. 93, 91 Am. Dec. 560, and note.

Section 3977. Service of Notice: The notices required by the preceding section may be served, either:

1. By delivering a copy to the tenant personally; or,
2. If he be absent from his place of residence and from his usual place of business, by leaving a copy with some person of suitable age

and discretion at either place, and sending a copy through the mail addressed to the tenant at his place of residence; or, if such place of residence and business cannot be ascertained, or a person of suitable age or discretion cannot be found there, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a sub-tenant may be made in the same manner.

1887 R. S. Sec. 5094.

SUMMARY PROCEEDINGS FOR POSSESSION OF LAND. JURISDICTION, PARTIES, PLEADING, PROCESS.

Section 3978. District Courts have Jurisdiction: The district court of the county in which the property or some part of it, is situated, has jurisdiction of proceedings under this chapter.

1887 R. S. Sec. 5095.

ELECTION BETWEEN INCONSISTENT REMEDIES: A party cannot be held to have made an election between two inconsistent remedies, when it does not appear that he was entitled to pursue both. Hence, one who commences an action of ejectment against his tenant is not thereby precluded from maintaining an action of unlawful detainer against the same tenant, though the action of ejectment has not

been dismissed, if it does not appear that such action could have been maintained.—*Agar v. Winslow*, 123 Cal. 587, 56 Pac. 422, 69 Am. St. Rep. 84.

One tenant in common cannot maintain an action for forcible entry and unlawful detainer against his co-tenant; but in order to obtain relief, must resort to a court of equity for a partition of the land in dispute.—*Lick v. O'Donnell*, 3 Cal. 59, 58 Am. Dec. 383.

Section 3979. Jurisdiction of Probate Court Limited: The probate court of the county in which the property, or some part of it, is situated, has jurisdiction of proceedings under this chapter when the whole amount of rent and damages claimed does not exceed five hundred dollars.

1887 R. S. Sec. 5096.

Section 3980. Jurisdiction of Justices' Courts Limited: Justices' courts have jurisdiction of proceedings under this chapter where the whole amount of rent and damages claimed does not exceed three hundred dollars.

1887 R. S. Sec. 5097.

Jurisdiction of justice court is not precluded: Sec. 3601.

Section 3981. Parties Defendant: No person other than the tenant of the premises, and sub-tenant, if there be one, in the actual occupation of the premises when the notice herein provided for was served, need be made parties defendant in the proceeding, nor shall any proceeding abate nor the plaintiff be non-suited for the non-joinder of any persons who might have been made parties defendant; but when it appears that any of the parties served with process or appearing in the proceeding are guilty of the offense charged, judgment must be rendered against him. Any person who shall become a sub-tenant of the premises or any part thereof after the service of notice as provided in this chapter shall be bound by the judgment. In case a married woman be a tenant or a sub-ten-

ant, her coverture shall constitute no defense; but in case her husband be not joined, or unless she be doing business as a sole trader; an execution issued upon a personal judgment against her, can only be enforced against property on the premises at the commencement of the action.

1887 R. S. Sec. 5098.

Forcible entry and detainer, contribution among joint tortfeasors, when

allowable.—*Culmer v. Wilson*, 13 Utah.

129, 44 Pac. 833, 57 Am. St. Rep. 713.

Section 3982. Parties Generally: Except as provided in the preceding section the provisions of this Code, relating to parties to civil actions, are applicable to this proceeding.

1887 R. S. Sec. 5099.

Section 3983. The Complaint. Summons to Issue: The plaintiff in his complaint, which shall be in writing, must set forth the facts on which he seeks to recover and describe the premises with reasonable certainty and may set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor. In case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. Upon filing the complaint, a summons must be issued thereon returnable as in other cases.

1887 R. S. Sec. 5100.

Forcible entry and forcible detainer should be separately stated in the complaint in an action therefor, for each is a separate cause of action; and unless so stated, the complaint will be held bad on demurrer; but if no demurrer is taken on this ground, the ob-

jection is deemed waived.

Fraud on the part of the defendant may constitute a special feature of the offenses under the act for which special damages may be recovered, and it should therefore be separately stated.—*Valencia v. Couch*, 32 Cal. 339, 91 Am. Dec. 589.

Section 3984. Arrest: If the complaint presented establishes, to the satisfaction of the judge or justice, fraud, force, or violence in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant.

1887 R. S. Sec. 5101.

Section 3985. Verification of Complaint and Answer: The complaint and answer must be verified.

1887 R. S. Sec. 5107.

SUMMARY PROCEEDINGS, POSSESSION OF LAND, TRIAL, JUDGMENT, EXECUTION, APPEAL.

Section 3986. Judgment by Default: If, at the time appointed, the defendant do not appear and defend, the court must enter his default and render judgment in favor of the plaintiff as prayed for in the complaint.

1887 R. S. Sec. 5102.

Section 3987. Trial by Jury: Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the

same manner as other trial juries in the court in which the action is pending.

1887 R. S. Sec. 5103.

Section 3988. Showing Required of Plaintiff. Defendant; Defense: On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein, is not then ended or determined; and such showing is a bar to the proceedings.

1887 R. S. Sec. 5104.

Section 3989. Complaint must be Amended, when: When upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs. Such amendment must be without any imposition of terms. No continuance shall be permitted upon account of such amendment, unless the defendant, by affidavit filed, shows to the satisfaction of the court good cause therefor.

1887 R. S. Sec. 5105.

Section 3990. Verdict and Judgment: If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court, be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for an unlawful detainer after neglect or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement. The jury or the court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint, and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent, and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due. When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which

time the tenant, or any sub-tenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceeding, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but, if payment, as here provided, be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately.

1887 R. S. Sec. 5106.

In actions provided for in foregoing section treble damages may be recovered: Sec. 3377.

DAMAGES: In an action of forcible entry and detainer, damages are not recoverable for injury to credit, nor for bodily or mental pain.—*Anderson v. Taylor*, 56 Cal. 131, 38 Am. Rep. 52.

VERDICT: Action of forcible entry and detainer against three persons; verdict of guilty as to two, and not guilty as to third. Held, that the verdict is conclusive that plaintiff was peaceably in actual possession of the premises at the time of the entry; and that such possession being incompatible with the lawful possession of the other, the verdict is conclusive against the possession of the third person.

Under writ of restitution in action of forcible entry and detainer, the sheriff is authorized to dispossess parties who,

though strangers to the proceedings, have entered into possession after the commencement of the action.—*Fremont v. Crippen*, 10 Cal. 212, 70 Am. Dec. 711.

SERVICE OF WRIT OF POSSESSION: In order to constitute a full execution of a writ of possession in an action of unlawful detainer, under the landlord and tenant act, the defendant and his property must be removed from the premises, and the possession of the real estate given to the plaintiff, unless the removal of the personal property is in some way waived by the defendant. And if, before such removal is substantially completed, the judge directs a stay of proceedings upon appeal, and a bond is given in pursuance of the direction, the proceedings are stayed, and the defendant may remain in possession pending the appeal.—*Lee Chuck v. Quan Wo Chong Co.* 81 Cal. 222, 22 Pac. 594, 15 Am. St. Rep. 50.

Section 3991. Effect of an Appeal from Judgment:

An appeal taken by the defendant does not stay proceedings upon the judgment unless the court so directs.

1887 R. S. Sec. 5108.

Appeal, condition of undertaking to stay execution: Sec. 3687.

Section 3992. Provisions Applicable to proceedings under this Chapter: The provisions of this Code, relative to civil actions, appeals, and new trials, so far as they are not inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

1887 R. S. Sec. 5109.

TITLE XX.

PROCEEDINGS IN PROBATE COURTS RELATING TO PROBATE MATTERS.

Chap. CLXXXV. Jurisdiction.

Chap. CLXXXVI. The Probate of Wills.

Chap. CLXXXVII. Executors and Administrators.

Chap. CLXXXVIII. Inventory and Collection of the Effects of Decedents.

Chap. CLXXXIX. Provisions for Support of Family and the Homestead.

Chap. CXC. Claims Against the Estate.

Chap. CXCI. Sales and Conveyances of Property of Decedent.

Chap. CXCI. Powers and Duties of Executors and Administrators and of the Management of Estates.

Chap. CXCI. Conveyance of Realty to Complete Decedent's Contract.

Chap. CXCI. Accounts Rendered by Executors and Administrators, and of the Payment of Debts.

Chap. CXCV. Partition, Distribution and Final Settlement of Estates.

Chap. CXCVI. Orders, Decrees, Process, Minutes, Records, Trials, and Appeals.

Chap. CXCVII. Public Administrator.

Chap. CXCVIII. Guardian and Ward.

Chap. CXCI. Appeals to District Court in Probate Matters.

CHAPTER CLXXXV.

JURISDICTION.

Section.

3993. Territorial jurisdiction of probate court over estate.

Section.

3994. When jurisdiction decided by first application.

Section 3993. Territorial Jurisdiction of Probate Court over Estate: Wills must be proved, and letters testamentary or of administration granted:

1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died;

2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the state;

3. In the county in which any part of the estate may be, the decedent having died out of the state, and not resident thereof at the time of his death;

4. In the county in which any part of the estate may be, the decedent not being a resident of the state, and not leaving estate in the county in which he died;

5. In all other cases, in the county where application for letters is first made.

1887 R. S. Sec. 5290.

Jurisdiction of probate court, generally: Sec. 3003.

Jurisdiction of probate court in probate matters: Sec. 3003.

Proceedings construed in same manner as proceedings of courts of general jurisdiction. Its records and judgments accorded like force: Sec. 3004.

Removal to another county, judge disqualified: Secs. 4096 to 4098.

JURISDICTION: There is nothing in the nature of jurisdiction, as applied to courts, which renders it exclusive. Jurisdiction is not a right or privilege be-

longing to the judge, but an authority or power to do justice in a given case, when it is brought before him; and the mere grant of jurisdiction to a particular court, without any words of exclusion, does not oust any other court of the powers which it before possessed. The jurisdiction of chancery over the estates of decedents, though it may have been displaced in ordinary cases, by the probate system of courts, is not abrogated by statutes conferring jurisdiction in such cases, on probate courts. Held, that the district court has, at least, concurrent jurisdiction of a con-

tract to make a will.—Burns v. Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653.

The superior court while sitting as a court of probate has no other powers than those given it by the statute, and such incidental powers as pertain to it for the purpose of enabling it to exercise the jurisdiction conferred upon it. It cannot determine disputes between heirs or devisees and strangers as to the title of the property.—Buckley v.

Superior Court, 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135.

IN WHAT COUNTY LETTERS OF ADMINISTRATION ISSUE: The probate court of the county of which the decedent was a resident at the time of his death, alone has jurisdiction to issue letters of administration upon his estate. The residence of a party at the time of his death, and not the situation of the estate, is the test of probate jurisdiction.—Estate of Harlan, 24 Cal. 182, 85 Am. Dec. 58.

Section 3994. When Jurisdiction Decided by First Application : When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, or being such non-resident and dying within the state, and not leaving estate in the county where he died, the probate court of that county in which application is first made for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate.

1887 R. S. Sec. 5291.

CHAPTER CLXXXVI.

THE PROBATE OF WILLS.

Section.

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- 3998. When executor forfeits rights to letters.
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- 4030. Contests and appointment of executors, etc., nuncupative wills.

PETITION, NOTICE AND PROOF.

Section 3995. Custodian of Will to Deliver to whom: Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the probate court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby.

1887 R. S. Sec. 5296.

Section 3996. Who may Petition for Probate of Will: Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state or a nuncupative will.

1887 R. S. Sec. 5297.

Section 3997. Contents of Petition: A petition for the probate of a will must show:

1. The jurisdictional facts;
2. Whether the person named as executor consents to act, or renounces his rights to letters testamentary;
3. The names, ages, and residence of the heirs and devisees of the decedent, so far as known to the petitioner;
4. The probable value and character of the property of the estate;
5. The name of the person for whom letters testamentary are prayed.

No defect of form, or in the statement of jurisdictional facts actually existing, shall make void the probate of a will.

1887 R. S. Sec. 5298.

Section 3998. When Executor Forfeits Rights to Letters: If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition the proper court for the probate of the will and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown.

1887 R. S. Sec. 5299.

Section 3999. Will, Petition for Presentation, how Enforced: If it is alleged in any petition that any will is in possession of a third person, and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time named in the order.

If he has possession of the will and neglects or refuses to produce

it in obedience to the order, he may by warrant from the court, be committed to the jail of the county, and be kept in close confinement until he produces it.

1887 R. S. Sec. 5300.

Section 4000. Notice of Petition for Probate: When the petition is filed and the will produced, the probate judge must fix a day for hearing the petition, not less than ten nor more than thirty days from the production of the will. Notice of the hearing shall be given by the clerk of the court, by publishing the same in a newspaper of the county. If there is none, then by three written or printed notices posted at three of the most public places in the county. If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication, and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and the last day being included. If the notice is by posting, it must be given at least ten days before the hearing.

1887 R. S. Sec. 5301.

Section 4001. Heirs and Named Executors Notified, how: Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator resident in the State, at their places of residence, if known to the petitioner, and deposited in the postoffice, with the postage thereon paid, at least ten days before the hearing. If their places of residence be not known, the copies of notice may be addressed to them and deposited in the postoffice at the county seat of the county where the proceedings are pending. A copy of the same notice must in like manner be mailed to the person named as executor, if he be not the petitioner; also to any person named as co-executor not petitioning, if their places of residence be known. Proof of mailing the copies of the notice must be made at the hearing. Personal service of copies of the notice at least ten days before the day of hearing, is equivalent to mailing.

1887 R. S. Sec. 5302.

Where the record is silent as to whether the heirs were personally served it will be conclusively presumed, in the absence of fraud, that service

was actually made.—In *re Twombley's Estate*, 120 Cal. 351, 52 Pac. 815.

Service of notice of probate on infant.—In *re Hamilton's Estate*, 120 Cal. 430, 52 Pac. 708.

Section 4002. Petition Presented to Judge at Chambers, Orders Thereon: The probate judge may, out of term time or at chambers, receive petitions for the probate of wills, and make and issue all necessary orders and writs to enforce the production of wills and the attendance of witnesses, and may appoint special terms of his court for hearing the petitions, trials of issues, and admitting to probate.

1887 R. S. Sec. 5303.

Section 4003. Hearing Proof of Will, Service of Notice: At the time appointed for, or to which the hearing may have been postponed, the court must require proof, by affidavit, that the

notices hereinbefore required have been personally served or mailed and published, which being made, the court must hear testimony in proof of the will.

If such notice is not proved to have been given, or if from any other cause it is necessary, the hearing may be postponed to a day certain, and notice to absentees given thereof as original notice is required to be given. The appearance in court of parties interested is a waiver of notice.

1887 R. S. Sec. 5304.

Section 4004. Probate, when no Contest: If no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

1887 R. S. Sec. 5306.

Section 4005. Olographic Wills: An olographic will may be proved in the same manner that other private writings are proved.

1887 R. S. Sec. 5307.

Proof of execution of writings: Sec. 4434.

OLOGRAPHIC WILLS, WHAT SUFFICIENT: The words: "Crolldepro, february 3, 1892. this is to sertify that ie levet to mey wife Real and personal and she to dispose for them as she wis," constitute a good olographic will, and should be read as follows: "Corral de Piedra, Feruary 3, 1892. This is to

certify that I leave to my wife (my) real and personal (property) and she to dispose of them as she wishes."—Mitchell v. Donohue, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279.

A will consisting of a printed form with the blanks filled in the testator's handwriting is not an olographic will, and no part of it can stand.—Estate of Rand, 61 Cal. 468, 44 Am. Rep. 555.

CONTESTS.

Section 4006. Who may Contest the Will: Any person interested may appear and contest the will. Devisees, legatees, heirs, or creditors of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest after probate, by the party so represented, if commenced within the time provided in this Chapter; nor does the non-appointment of an attorney by the court of itself invalidate the probate of a will.

1887 R. S. Sec. 5305.

Attorney court may appoint, to represent party: Sec. 4319.

A compromise agreement by an heir to relinquish his rights and not to con-

test a will is a valid agreement and will estop the heir from maintaining any proceeding to revoke the probate of such will.—In re Garcelon, 104 Cal. 570, 38 Pac. 414, 43 Am. St. Rep. 134.

Section 4007. Contestant's Grounds of Contest, Petitioner's Reply: If anyone appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer to a complaint in civil actions. If the demurrer is sustained, the court must allow the contestant a reasonable

time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing, or otherwise obviating or avoiding the objections. Any issues of fact thus raised involving:

1. The competency of the decedent to make a last will and testament;
2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence;
3. The due execution and attestation of the will by the decedent or subscribing witnesses; or,
4. Any other questions substantially affecting the validity of the will;

Must, on request of either party in writing (filed three days prior to the day set for the hearing), be tried by a jury. If no jury is demanded, the court must try and determine the issues joined. On the trial the contestant is plaintiff, and the petitioner is defendant.

1887 R. S. Sec. 5308.

WILLS, TESTAMENTARY CAPACITY, UNDUE INFLUENCE, EVIDENCE, DECLARATIONS OF TESTATOR: The special finding of a jury that a testator was competent to make the will in question at the time that it was made is in conflict with the findings that the testator was laboring under an insane delusion, and was not of sound and disposing mind.

Finding that a will was made under duress and undue influence presupposes testamentary capacity, or a sound and disposing mind.

When an attesting witness undertakes to impeach the will, his testimony should be received with the utmost caution.

The declarations of a testator, made after the execution of a will, showing his dissatisfaction therewith and his intention to execute a new will, are not admissible to show that said will was executed under duress or undue influence.

A will cannot be impeached by the subsequent oral declarations of the testator.

Such declarations are entitled to no weight, in the absence of proof of undue influence as to the testamentary act complained of.

No presumption of the exercise of undue influence arises in this case by reason of the relation of the parties, or that the wife had opportunity to exercise such influence.—*Gwin v. Gwin* (Idaho), 48 Pac. 295.

REVOCATION OF WILL: Whenever new moral and testamentary duties arise subsequent to the execution of a will, it is presumed that it is the mind and intention of the maker to discharge those duties, and the will is said

to be revoked by operation or presumption of law; unless indeed the objects of those new duties are provided for, either by the law or the will itself.—*Morgan v. Ireland*, 1 Idaho, 786.

Sub. 2. WILLS, UNDUE INFLUENCE, EVIDENCE SUFFICIENT TO PROVE: Unless there is evidence tending to prove some fraud practiced upon the testator, or that some physical or moral coercion was employed such as to destroy his free agency, the court should not submit to the jury the question whether undue influence had been used. If a person has testamentary capacity, his will cannot be avoided on the ground that it is unjust or capricious. Statements made by a testator after its execution to the effect that he did not make the will and did not know what was in it, that he wanted to give a particular heir as much as the others, and did not feel safe if he made another will, are not admissible to impeach his will. In a contest of a will by which one of the heirs of a testator was disinherited, it is not proper to admit evidence of the wealth of the heirs who are preferred by the decedent as compared with the wealth of the heir omitted from the will.—*In re Kaufman*, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179.

Sub. 3. MISTAKE OF WITNESS IN SIGNING HIS NAME: If a witness undertaking to attest the execution of a will, and intending to sign his name as a witness thereto, inadvertently writes, instead of his own name, his initials, followed by the surname of the testator, the will is not properly witnessed, and must be denied probate, if the statute requires that every will must be attested by two witness each of whom must sign his name as a witness at the end

of the will.—*In re Walker*, 110 Cal. 387, 42 Pac. 815, Am. St. Rep. 104.

Sub. 4. CONSTRUCTION: If a charitable intent appears on the face of a will, but the terms used are broad enough to allow the fund being applied either in a lawful or unlawful manner, the gift must be supported, and its application restrained within the bounds of the law.—*Staines v. Burton*, 17 Utah, 331, 53 Pac. 1015, 70 Am. St. Rep. 788.

PRETERMITTED HEIRS: Parol evidence is inadmissible for the purpose of determining whether the omission from a will of one entitled, in the event of intestacy, to take of the estate, was intentional on the part of the testator. This can be determined only from the face of the will.—*In re Salmon*, 107 Cal. 614, 40 Pac. 1030, 48 Am. St. Rep. 164; *Estate of Stevens*, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252.

The presumption raised by a statute, that the omission by a testator to provide for any of his children was not intentional, may be rebutted by extrinsic evidence, whether of declarations of the testator, or collateral facts showing the intention of the testator to have been that which the language of the will expresses.—*In re Atwood*, 14 Utah, 1, 45 Pac. 1036, 60 Am. St. Rep. 878.

The true test of the character of an instrument, as to whether it is a will, is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest. The essential characteristic of an instrument testamentary in its nature is, that it operates only upon, and by reason of, the death of the maker and is ambulatory, and that by its execution the maker has parted with no rights and divested himself of no part of his estate.—*Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089, 60 Am. St. Rep. 878.

WILLS, WHAT ARE NOT: A paper cannot be regarded as a will, unless the intention of the decedent that it should stand for a last will and testament is clearly apparent. The heirs at law are not to be disinherited when such intention is not expressed with legal certainty. A letter directed to an undertaker, asking him, in the event of the

writer's death, to cremate her body and to apprise her brother of such death, and adding that her brother would take charge of her estate and be sole administrator without bonds, to trade, sell, or occupy, as may seem fit to him, is not testamentary in character, and neither gives him her estate nor appoints him administrator thereof.—*Estate of Meade*, 118 Cal. 428, 50 Pac. 541, 62 Am. St. Rep. 244.

A letter written by a testator to his attorney, saying: "What I want is for you to change my will so that she will be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended to as soon as convenient. I do not know what ought to be done, but you do," discloses an animus testandi, and should be admitted to probate with the will to which it refers, for it, with such will, must be regarded as one instrument, constituting the last will of the testator.—*Barney v. Hayes*, 11 Mont. 571, 29 Pac. 282, 28 Am. St. Rep. 495.

A paper referred to and made part of a will, if such paper is then in existence, and is so referred to in the will that it is capable of being identified from inspection, or by the aid of parol or other evidence may be probated as part of the will. A paper referred to in a will, but not in existence until after the will is executed, may not be admitted to probate as a part thereof. Hence, if a will bequeaths property to the executor to be disposed of as directed in a letter to him from the testator of the same date, and such letter is written and signed after the will is executed, though on the same day, it cannot be admitted to probate as a part thereof. A will cannot be denied probate because it refers to another paper as a part thereof, which cannot be admitted to probate, because bequests therein are void for uncertainty.—*In re Shillaber*, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433.

SUPPLYING OMITTED WORDS: Courts, in reading wills, always supply obviously omitted words whenever the word omitted is apparent, and no other word will supply the defect.—*Mitchell v. Donohue*, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279.

Section 4008. How Jury Obtained and Trial Had:

When a jury is demanded, the probate court must summons and impanel a jury to try the case, in the manner provided for summoning and impaneling trial juries in civil actions, and the trial must be conducted in the same manner as the trial of civil actions in the district court.

Section 4009. Verdict of Jury. Judgment. Appeal:

The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court, upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will is admitted to probate, the judgment, will and proofs must be recorded.

1887 R. S. Sec. 5310.

Section 4010. Witnesses, who Examined. Proof of Handwriting:

If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of the execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them.

1887 R. S. Sec. 5311.

Execution of will, evidence, sufficiency of.—See

In re Tyler's Estate, 121 Cal. 407, 53 Pac. 928.

Section 4011. Testimony Reduced to Writing. Evidence Subsequent Contests: The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this State.

1887 R. S. Sec. 5312.

Section 4012. If Proved, Certificate to be Attached:

If the court is satisfied, upon the proof taken or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the probate judge and attested by the seal of the court, must be attached to the will.

1887 R. S. Sec. 5313.

Decree of probate admitting will to probate is final and conclusive as to the validity thereof, if not reversed by the appellate court, and is not liable to be vacated or questioned by any other court, either incidentally or by any direct proceeding for the purpose of impeaching it. A will admitted to probate must be recognized and admitted in all courts to be valid so long as the probate stands.—*State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118.

Probate court acquires jurisdiction to probate will on presentation to it of petition stating all the necessary facts,

and the publication of due and legal notice of time of proving the will, and its determination thereafter in admitting the will to probate is final, except upon a direct proceeding by appeal or otherwise, to reverse it, and cannot be questioned collaterally. Proceedings for probate of a will cannot be attacked for irregularity, in collateral proceedings, by petition to have such proceedings adjudged void on the ground of want of jurisdiction, and praying that the will be admitted anew to probate.—*In the Matter of Will of Warfield*, 22 Cal. 51, 83 Am. Dec. 49.

RECORD.

Section 4013. Will and Proof Filed and Recorded:

The will and a certificate of the proof thereof, must be filed by the clerk and recorded by him in a book to be provided for the purpose. All testimony shall be filed by the clerk.

1887 R. S. Sec. 5314.

FOREIGN WILLS.

Section 4014. Proved in Other States. Recorded

When and Where: Every will duly proved and allowed in any part of the United States, or in any foreign country or state, may be allowed and recorded in the probate court of any county in which the testator shall have left any estate.

1887 R. S. Sec. 5315.

Section 4015. Proceedings on Production of Foreign

Will: When a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will with a petition for letters the same must be filed, and the court or judge must appoint a time for the hearing; notice whereof must be given as hereinbefore provided for an original petition for the probate of a will.

1887 R. S. Sec. 5316.

Petition: Secs. 3996 et seq.

Cited and construed in *In re Engle's Estate*, 124 Cal. 293, 56 Pac. 1022.

Section 4016. Hearing Proofs; Probate of Foreign

Will: If, on the hearing, it appears upon the face of the record that the will has been proved, allowed and admitted to probate in the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this State, it must be admitted to probate, and have the same force and effect as a will first admitted to probate in this State and letters testamentary or of administration issued thereon.

1887 R. S. Sec. 5317.

If an executor in this state is also ancillary administrator in a foreign country, and, as such, has within his control personal assets in such country, which he refuses or wilfully neglects to bring into this, he may be charged therewith in the settlement of his accounts in this state. It is the duty of a domiciliary executor to gather in and account for foreign assets of his testator, to the extent of his ability to do so, and the court of the domicile may compel him to account for his wilful neglect to perform such duty. If the estate of a decedent is situate in two or more countries, and his executor incurs expenses of administration, they should be paid out of that part of the estate in the administration of which they were incurred, and not out of the part of the

estate situated in another country.—*In re Ortiz*, 86 Cal. 306, 24 Pac. 1034, 21 Am. St. Rep. 44.

Where the assets of an estate situated within a jurisdiction come into the hands of a foreign executor while residing within that jurisdiction, by voluntary payment or administration, he is bound to account for them in the domiciliary jurisdiction.

Where a foreign executor, as trustee, has taken a note and mortgage from his co-executor for fund received by the latter as belonging to the estate, he may maintain an action to recover the fund, and to foreclose the mortgage as mortgagee, without taking out letters testamentary in the jurisdiction where the mortgaged property is situated.—*Fox v. Tay*, 89 Cal. 339, 26 Pac. 897, 23 Am. St. Rep. 474.

CONTESTS AFTER PROBATE.

Section 4017. The Probate may be Contested within One Year: When a will has been admitted to probate, any person interested may at any time within one year after such probate contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked.

1887 R. S. Sec. 5318.

Conclusiveness of probate: Sec. 4023.

Equity has no jurisdiction to set aside the probate of a will on the ground of fraud, mistake or forgery, this being within the exclusive jurisdiction of the probate court.—*Langdon v. Blackburn*, 109 Cal. 28, 41 Pac. 814.

PRACTICE: Sufficiency of petition

and amendments.—See *In re Wilson's Estate*, 117 Cal. 264, 49 Pac. 172 and 711; *S. F. Prot. Orphan Asylum v. Superior Court*, 116 Cal. 446, 48 Pac. 379; *In re Redfield's Estate*, 116 Cal. 643, 48 Pac. 794.

Such contest is a special proceeding.—*In re Joseph's Estate*, 118 Cal. 661, 50 Pac. 768.

Section 4018. Citation Issued to Parties Interested: Upon filing the petition a citation must be issued to the executors of the will or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will and heirs residing in the State so far as known to the petitioners; or to their guardians, if any of them are minors, or to their personal representatives, if any of them are dead, requiring them to appear before the court on some day of a regular term therein specified, to show cause why the probate of the will should not be revoked.

1887 R. S. Sec. 5319.

A citation to be issued under this section is in the nature of a summons and construing this section in connection with Section 4314, post, the jurisdiction

to issue a citation ceases in one year after the petition for revocation was filed.—*Bacigalupo v. Superior Court*, 108 Cal. 92, 40 Pac. 1055.

Section 4019. Hearing had on Proof of Service: At the time appointed for showing cause or at any time to which the hearing is postponed, personal service of the citations having been made upon any persons named therein, the court must proceed to try the issues of fact joined in the same manner as in an original contest of a will.

1887 R. S. Sec. 5320.

Section 4020. Petitions to Revoke Probate Tried by Jury or Court. Judgment: In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had, as in cases of the contest of an original petition to admit a will to probate. If, upon hearing the proofs of the parties, the jury shall find, or, if no jury is had, the court shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked.

1887 R. S. Sec. 5321.

The mere filing of written grounds of opposition to the probate of a will,

which is abandoned and dismissed before any issues of fact are raised thereon, does not constitute a "contest" to

its probate, within the meaning of Section 4006, ante, and under this section a party who subsequently petitions to revoke the probate of such will, upon making the proper demand therefor, is entitled as of right to a jury trial. Such right to a jury trial, when the demand

therefor has been denied, is not waived by going to trial before the court, or by the petitioners' failure to present evidence sufficient to secure a revocation of the probate.—In re Robinson, 106 Cal. 493, 39 Pac. 862.

Section 4021. Revocation of Probate, Powers of Executor Cease: Upon the revocation being made, the powers of the executor or administrator with the will annexed, must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.

1887 R. S. Sec. 5322.

Section 4022. Costs and Expenses, by Whom Paid: The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.

1887 R. S. Sec. 5323.

Where it was found that the will revoked was obtained through the undue influence of one of the executors,

an order taxing the costs to the executors was properly entered.—In re McKinney's Estate, 112 Cal. 452, 44 Pac. 743.

Section 4023. Probate, when Conclusive: If no person within one year after the probate of a will, contests the same, or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed.

1887 R. S. Sec. 5324.

LOST WILLS.

Section 4024. Proof of Lost or Destroyed Will: Whenever any will is lost or destroyed the probate court must take proof of the execution and validity thereof, and establish the same, notice to all persons interested being first given, as prescribed in regard to proofs of wills in other cases. All the testimony given must be reduced to writing, and signed by the witnesses.

1887 R. S. Sec. 5325.

Evidence to establish lost or destroyed wills: See note 38 L. R. A. 433.

Section 4025. Must have Existed at Time of Death: No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

1887 R. S. Sec. 5326.

Section 4026. Certified and Recorded. Letters thereon Granted: When a lost will is established, the provisions thereof must be distinctly stated and certified by the probate judge under his hand and the seal of his court, and the certificate, together with

the testimony upon which it is founded, must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration with the will annexed, must be issued thereon, in the same manner as upon wills produced and duly proved.

1887 R. S. Sec. 5327.

Section 4027. Restrain Injurious Acts of Executors During Proceedings: If before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors so appointed, from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

1887 R. S. Sec. 5328.

NUNCUPATIVE WILLS.

Section 4028. Nuncupative Wills, when and how Probated: Nuncupative wills may at any time within six months after the testamentary words are spoken by the decedent, be admitted to probate on petition and notice as provided for the probate of written wills. The petition in addition to the jurisdictional facts, must allege that the testamentary words, or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing must accompany the petition.

1887 R. S. Sec. 5329.

Section 4029. Additional Requirements, Probate Nuncupative Wills: The probate court must not receive or entertain a petition for the probate of a nuncupative will, until the lapse of fourteen days from the death of the testator, nor must such petition at any time be acted on until the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife (if any), and all other persons resident in the State, interested in the estate, are notified as hereinbefore provided.

1887 R. S. Sec. 5330.

Section 4030. Contests and Appointment of Executors, etc. Nuncupative Wills: Contests of the probate of nuncupative wills and appointments of executors and administrators of the estate devised thereby must be had, conducted and made as hereinbefore provided in cases of the probate of written wills.

1887 R. S. Sec. 5331.

CHAPTER CLXXXVII.

EXECUTORS AND ADMINISTRATORS.

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EXECUTORS. COMPETENCY, OBJECTIONS, LETTERS TESTAMENTARY.

Section 4031. Letters to Issue to Executor Named:

The court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as

executors, who are competent to discharge the trust, who must appear and qualify, unless objection is made, as hereinafter provided.

1887 R. S. Sec. 5340.

A direction in a will to the executors to employ a certain attorney is not binding on the executors nor does such provision show an intent to commit the execution of the will to such attorney and entitle him to be selected as one of the executors, though the statute declares that where it appears by the

terms of a will that it was the intention of the testator to commit the execution thereof to any person as executor, such person, though not named as executor, is entitled to letters testamentary in like manner as if he had been so named.—*In re Ogier*, 101 Cal. 381, 25 Pac. 900, 40 Am. St. Rep. 61.

Section 4032. Who are Incompetent as Executors.

No person is competent to serve as executor who, at the time the will is admitted to probate, is:

1. Under the age of majority;
2. Convicted of an infamous crime;
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

If the sole executor or all the executors are incompetent, or renounce or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued.

1887 R. S. Sec. 5341.

Section 4033. Objection to Executor, Proceedings Thereon:

Any person interested in a will may file objections in writing, or granting letters testamentary to the persons named as executors, or any of them, and the objections must be heard and determined by the court. A petition may, at the same time, be filed for letters of administration, with the will annexed.

1887 R. S. Sec. 5342.

Section 4034. Married Woman as Executrix: When an unmarried woman, appointed as executrix, marries, her authority is extinguished. When a married woman is named as executrix she may be appointed and serve in every respect as a feme sole.

1887 R. S. Sec. 5343.

Marriage of executrix divests her of authority.—*Teschemacher v. Thompson*, 18 Cal. 11, 79 Am. Dec. 151.

Section 4035. Executor of an Executor: No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued.

1887 R. S. Sec. 5344.

Section 4036. Proceedings when Minor Absentee Named Executor:

Where a person absent from the State, or a minor is named executor—if there is another executor who accepts the trust and qualifies—the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will an-

nexed, must be granted; but the court may, in its discretion, revoke them on the return of the absent executor or the arrival of the minor at the age of majority.

1887 R. S. Sec. 5345.

Section 4037. Acts of a Portion of Executors Valid:

When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust required by the will, as effectually for every purpose as if all were appointed and should act together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the State or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority, in writing to act for both; and where there are more than two executors or administrators, the act of a majority is valid.

1887 R. S. Sec. 5346.

Removals and suspensions: Sec. 4099

Revocation of probate: Sec. 4021. et seq.

Section 4038. Form of Letters Testamentary: Letters testamentary must be substantially in the following form:

“State of Idaho, county of..... The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of, C. D., who is named therein, is hereby appointed executor. Witness, G. H., clerk of the probate court of the county of, with the seal of the court affixed, the.....day of....., A. D., 19...

[Seal.]

By order of the court.

G. H., Clerk.”

1887 R. S. Sec. 5348.

ADMINISTRATORS. WITH WILL ANNEXED.

Section 4039. Authority of Administrators with Will Annexed: Administrators with the will annexed have the same authority over the estates which executors named in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the clerk of the court and bear the seal thereof.

1887 R. S. Sec. 5347.

Section 4040. Form of Letters of Administration with Will Annexed: Letters of administration, with the will annexed must be substantially in the following form:

“The State of Idaho, county of..... The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of, and there being no executor named in the will (or as the case may be,) C. D., is hereby appointed administrator with the will annexed. Witness, G. H., clerk of the probate court of the county of.....,

with the seal of the court affixed, the day of.....,
A. D., 19. . .

[Seal.]

By order of the court.

G. H., Clerk."

1887 R. S. Sec. 5349.

ADMINISTRATORS, PREFERENCE, COMPETENCY, APPOINTMENT.

**Section 4041. Order of Persons Entitled to Admin-
isiter:** Administration of the estate of a person dying intestate must
be granted to some one or more of the persons hereinafter mentioned
and they are respectively entitled thereto in the following order:

1. The surviving husband or wife or some competent person
whom he or she may request to have appointed;
2. The children;
3. The father or mother;
4. The brothers;
5. The sisters;
6. The grandchildren;
7. The next of kin entitled to share in the distribution of the es-
tate;
8. Any of the kindred;
9. The public administrator;
10. The creditors;
11. Any person legally competent;

If the decedent was a member of a partnership at the time of his
decease, the surviving partner must in no case be appointed admin-
istrator of his estate.

1887 R. S. Sec. 5351.

**Section 4042. Preference of Persons Equally En-
titled:** Of several persons claiming and equally entitled to admin-
ister, males must be preferred to females, and relatives of the whole
to those of the half blood.

1887 R. S. Sec. 5352.

Section 4043. In Discretion of Court, when: When
there are several persons equally entitled to the administration, the
court may grant letters to one or more of them; and when a creditor
is claiming letters the court may, in its discretion, at the request of
another creditor grant letters to any other person legally competent.

1887 R. S. Sec. 5353.

**Section 4044. When Minor Entitled, who Ap-
pointed:** If any person entitled to administration is a minor, let-
ters must be granted to his or her guardian, or any other person
entitled to letters of administration, in the discretion of the court.

1887 R. S. Sec. 5354.

**Section 4045. Who are Competent as Administra-
tors:** No person is competent to serve as administrator or adminis-
tratrix who is:

1. Not a bona fide resident of the State;

2. Under the age of majority;
3. Convicted of an infamous crime;
4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

1887 R. S. Sec. 5355.

Sub. 4. Incompetency from drunken-

ness: See *In re Connor's Estate*, 110

Cal. 410, 42 Pac. 906.

Section 4046. Married Woman not to be Administratrix: A married woman must not be appointed administratrix. When an unmarried woman appointed administratrix marries, her authority is extinguished.

1887 R. S. Sec. 5356.

Married woman as executrix: Sec. 4034.

Section 4047. Application, how Made: Petitions for letters of administration, must be in writing, signed by the applicant or his counsel and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments.

1887 R. S. Sec. 5357.

Petition for letters of administration must allege death of decedent, and this allegation must also be true in point of fact. If this fact does not exist, the proceedings will be utterly void, and not merely voidable; and the decision of the

probate court upon jurisdictional facts is not conclusive upon any one not actually before the court.—*Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703; see also note 23 Am. St. Rep. 114.

Section 4048. When Granted: Letters of administration may be granted at a regular term of the court, or at a special term appointed by the judge for the hearing of the application.

1887 R. S. Sec. 5358.

MINISTERIAL ACTS, JUDICIAL ACTS: The act of appointing an administrator of an estate by a probate court is a judicial act, while that of issuing letters of administration is merely

ministerial; therefore, the statute, only forbidding the transaction of judicial business on Christmas day, letters issued on that day are not void.—*Glen-denning v. McNutt*, 1 Idaho, 592.

Section 4049. Notice of Application: When a petition praying for letters of administration is filed, the clerk must give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing.

1887 R. S. Sec. 5359.

Proper notice of application for letters of administration must be given to

bring parties before the court in order to give it jurisdiction.—*Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237.

Section 4050. Contesting Application: Any person interested may contest the petition by filing written opposition thereto,

on the ground of the incompetency of the applicant, or may assert his own rights to the administration and pray that letters be issued to himself. In the latter case the contestant must file a petition and give the notice required for an original petition, and the court must hear the two petitions together.

1887 R. S. Sec. 5360.

Section 4051. Hearing of Application: On the hearing, it being first proved that notice has been given as herein required, the court must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto.

1887 R. S. Sec. 5361.

Section 4052. Evidence of Notice: An entry in the minutes of the court, that the required proof was made and notice given, shall be conclusive evidence of the fact of such notice.

1887 R. S. Sec. 5362.

Section 4053. Grant to Any Applicant: Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves.

1887 R. S. Sec. 5363.

Monroe v. Shiels, 120 Cal. 348, 52 Pac.

This section cited and discussed in 808.

Section 4054. What Proofs Before Granting Letters of Administration: Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others; and the court may also examine any other person concerning the time, place and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.

1887 R. S. Sec. 5364.

Section 4055. Letters Granted upon Request of Person Entitled: Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the State, affidavits taken ex parte before any officer authorized by the laws of this State to take acknowledgments and administer oaths out of the State, may be received as primary evidence of the identity of the party, if free from suspicion and the fact is established to the satisfaction of the court.

1887 R. S. Sec. 5365.

Section 4056. Revocation of Letters of Administration: When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother or sister of the intestate, any one of them who is competent,

or any competent person at the written request of any of them, may obtain the revocation of the letters and be entitled to the administration by presenting to the court a petition praying the revocation and that letters of administration may be issued to him.

1887 R. S. Sec. 5366.

well as to cases of intestacy.—In re Li

These provisions apply to letters of Po Tai, 108 Cal. 484, 41 Pac. 486.
administration with the will annexed as

Section 4057. Citation and Notice Required: When such petition is filed, the clerk must in addition to the notice required on application for letters, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing.

1887 R. S. Sec. 5367.

Section 4058. Hearing of Petition of Revocation: At the time appointed, the citation having been duly served and returned, the court must proceed to hear the allegations and proofs of the parties, and if the right of the applicant is established and he is competent, letters of administration must be granted to him and the letters of the former administrator revoked.

1887 R. S. Sec. 5368.

Section 4059. Prior Rights of Relatives Entitles them to Revoke: The surviving husband or wife, when letters of administration have been granted to a child, father, brother, or sister of the intestate; or any of such relatives, when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections.

1887 R. S. Sec. 5369.

Section 4060. Form of Letters of Administration: Letters of administration must be signed by the clerk under the seal of the court, and substantially in the following form:

“State of Idaho, county of..... C. D. is hereby appointed administrator of the estate of A. B., deceased.

[Seal.] Witness, G. H., Clerk of the Probate Court of the county of....., with the seal thereof affixed, the.....day of....., A. D., 19....

By order of the court.

G. H., Clerk.”

1887 R. S. Sec. 5350.

OATH, BOND AND SURETIES.

Section 4061. Oath. Recording Letters and Bond: Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by executors or administrators, with the affidavits and certificates thereon, must be forth-

with recorded by the clerk of the court having jurisdiction of the estates, in books to be kept by him in his office for that purpose.

1887 R. S. Sec. 5370.

Section 4062. Bond of Administrator, Form and Requirements: Every person to whom letters testamentary or of administration are directed to issue, must, before receiving them, execute a bond to the State of Idaho, with two or more sufficient sureties, to be approved by the probate judge. In form, the bond must be joint and several, and the penalty must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits and issues of the real property belonging to the estate, which values must be ascertained by the probate judge, by examining on oath the party applying, and any other persons.

1887 R. S. Sec. 5371.

Proceedings by sureties to secure release and for the giving of new bonds and undertakings: Sec. 3753.

Provision for the protection of sureties by the deposit of funds in bank: Sec. 3754.

Provision for reimbursement for premiums in guaranty surety companies: Sec. 3755.

An administrator's bond purporting to be the joint obligation of the principal and the sureties, and the several obligation of the latter, and which the principal does not sign, though letters of administration are issued to him thereon, under which he receives and misappropriates the estate of the dece-

dent, is absolutely void against the sureties, who, therefore, can not be held answerable for his default.—*Weir v. Mead*, 101 Cal. 125, 35 Pac. 567, 40 Am. St. Rep. 46 and note.

As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in court, or an opportunity to be heard in their defense; but administration bonds form an exception to this general rule. The sureties may show in defense either that the bond was not made, or that the decree was not made, or that the same was obtained by fraud or collusion.—*Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125.

Section 4063. Additional Bonds, when Required: The probate judge must require an additional bond whenever the sale of any real estate belonging to an estate is ordered; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or of any bond given in place thereof, is equal to twice the value of the personal property remaining in, or that will come into, the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold.

1887 R. S. Sec. 5372.

Section 4064. Conditions of Bonds: The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law.

1887 R. S. Sec. 5373.

Decree settling account binds surety: Secs. 4257, 4258.

Section 4065. Several Administrators to Give Separate Bonds: When two or more persons are appointed executors or administrators, the probate judge must require and take a separate bond from each of them.

1887 R. S. Sec. 5374.

Section 4066. Recoveries had on Bond: The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted.

1887 R. S. Sec. 5375.

Section 4067. Bonds, Justification of Sureties. Approval: In all cases where bonds or undertakings are required to be given, under this Title, the sureties must justify thereon as required by this Code, and the certificate thereof must be attached to, and filed and recorded with the bond or undertaking. All such bonds and undertakings must be approved by the probate judge before being filed or recorded.

1887 R. S. Sec. 5376.

Section 4068. Requirements of Additional Security: Before the probate judge approves any bond required under this Title, he may of his own motion, or at any time after the approval of such bond, upon the motion of any person interested in the estate, supported by affidavit that any one or all of such sureties are not worth as much as they have justified to, order a citation to issue, requiring such sureties to appear before him, at a certain time and place, to testify touching their property and its value; and the judge must, at the time such citation is issued, cause a notice to be issued to the executor or administrator, requiring his appearance at the return of the citation. Upon the return of the citation, the judge may swear and examine the sureties, and such witnesses as may be produced, touching the property of such sureties and its value; and if, upon such investigation, the judge is satisfied that the bond is insufficient, he may require sufficient additional security, within such time as may be reasonable, not less than five days.

1887 R. S. Sec. 5377.

of citation.—Barrett v. Superior Court,
Voluntary appearance waives service 111 Cal. 156, 43 Pac. 519.

Section 4069. Right Ceases when Security not Given: If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration.

1887 R. S. Sec. 5378.

Section 4070. Bond Dispensed with when Will so Provides: When it is expressly provided in the will of a testator that no bond is required of the executor, letters testamentary may issue and sales of real estate be made and confirmed without any bond being given; but an executor to whom letters are issued without bond, may at any time afterward (when it appears from any cause, necessary or proper), be required to file a bond as in other cases.

1887 R. S. Sec. 5379.

Section 4071. Petition Showing Failing Sureties Further Bonds: Any person interested in an estate may, by verified petition, represent to the probate judge that the sureties of the executor or administrator thereof have become or are becoming insolvent, or that they have removed, or about to remove from the State, or that from any other cause the bond is insufficient, and ask that further security be required.

1887 R. S. Sec. 5380.

Section 4072. Citations to Executor to Show Cause: If the probate judge is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator, requiring him to appear at a time and place to be therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded or cannot be found, it may be served by leaving a copy of it at his last place of residence or by such publication as the court or judge may order.

1887 R. S. Sec. 5381.

Section 4073. Further Security may be Ordered: On the return of the citation or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security is from any cause insufficient, he may make an order requiring the executor or administrator to give further security or to file a new bond in the usual form, within a reasonable time, not less than five days.

1887 R. S. Sec. 5382.

Section 4074. Neglecting to Obey Order: If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease.

1887 R. S. Sec. 5383.

Section 4075. Suspending Powers of Executor: When a petition is presented praying that an executor or administrator be required to give further security, or to give bond, where, by the terms of the will, no bond was originally required, and it is alleged on oath that the executor or administrator is wasting the property of the estate, the judge may by order suspend his powers until the matter can be heard and determined.

1887 R. S. Sec. 5384.

Suspending powers until bond given:
Sec. 4070.

Section 4076. Further Security Ordered without Application: When it comes to his knowledge that the bond of any executor or administrator is, from any cause, insufficient, the probate judge, without any application, must cause him to be cited to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested.

1887 R. S. Sec. 5385.

Section 4077. Release of Sureties: When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application to the probate court or judge for relief. The court or judge must cause a citation to the executor or administrator to be issued, and served personally, requiring him to appear at a time and place to be therein specified, and to give other security. If he has absconded, left, or removed from the State, or if he cannot be found after due diligence and inquiry, service may be made as provided in Section 4072.

1887 R. S. Sec. 5386.

Mere passive delay and forbearance on the part of the heirs will not discharge the sureties on the executor's bond, nor affect their obligation which was conditioned that their principal

should discharge all the duties as executor, where such obligation has not been discharged owing to their failure to procure their release from further responsibility as provided herein.—*Biggins v. Raisch*, 107 Cal. 210, 40 Pac. 333.

Section 4078. New Sureties: If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator.

1887 R. S. Sec. 5387.

Section 4079. Neglect to Give, Forfeits Letters: If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the court or judge must, by order, revoke his letters.

1887 R. S. Sec. 5388.

Section 4080. Applications may be Determined any Time: The applications authorized by the nine preceding sections of this Chapter may be heard and determined at any time. All orders made therein must be entered upon the minutes of the court.

1887 R. S. Sec. 5389.

SPECIAL ADMINISTRATORS.

Section 4081. Special Administrators, when Appointed: When there is delay in granting letters testamentary or of administration, from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an administrator or executor dies, or is suspended or removed, the probate judge must appoint a special administrator to collect and take charge of the estate of the decedent, in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate; or he may direct the public administrator of his county to take charge of the estate.

1887 R. S. Sec. 5390.

Section 4082. Special Letters Issued out of Term: The appointment may be made at any time, and without notice, and

must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator, upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person, in conformity with the order.

1887 R. S. Sec. 5391.

Section 4083. Preference Given Persons Entitled to Letters: In making the appointment of a special administrator, the probate judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment.

1887 R. S. Sec. 5392.

Section 4084. Special Administrator, Bond and Oath: Before any letters issue to any special administrator, he must give bond in such sum as the probate judge may direct, with sureties to the satisfaction of the judge, conditioned for the faithful performance of his duties; and he must take the usual oath and have the same endorsed on his letters.

1887 R. S. Sec. 5393.

Section 4085. Duties of Special Administrator: The special administrator must collect and preserve for the executor or administrator, all the goods, chattels, debts, and effects of the decedent, all incomes, rents, issues and profits, claims and demands of the estate: must take the charge and management of, enter upon and preserve from damage, waste, and injury, the real estate, and for any such and all necessary purposes, may commence and maintain, or defend, suits and other legal proceedings, as an administrator; he may sell such perishable property as the probate court may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent.

1887 R. S. Sec. 5394.

Section 4086. When Special Administrator's Powers Cease: When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator, all the property and effects of the decedent in his hands; and the executor or administrator may prosecute to final judgment any suit commenced by the special administrator.

1887 R. S. Sec. 5395.

Section 4087. Special Administrator to Render Account: The special administrator must render an account on oath, of his proceedings, in like manner as other administrators are required to do.

1887 R. S. Sec. 5396.

REVOCATION, INCAPACITY AND RESIGNATION.

Section 4088. Proof of Will After Letters of Ad-

ministration Revoked: If, after granting letters of administration on the ground of intestacy, a will of decedent is duly proved and allowed by the court, the letters of administration must be revoked, and the power of the administrator ceases, and he must render an account of his administration within such time as the court shall direct.

1887 R. S. Sec. 5397.

Section 4089. Power of Executor in such Case: In such case, the executor or the administrator, with the will annexed, is entitled to demand, sue for, recover, and collect all the rights, goods, chattels, debts, and effects of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration.

1887 R. S. Sec. 5398.

Section 4090. Remaining Executor to Continue when one Disqualified: In case any one of several executors or administrators, to whom letters are granted, dies, becomes a lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust; or in case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration.

1887 R. S. Sec. 5399.

Section 4091. Procedure upon Death or Incapacity of All: If all such executors or administrators die or become incapable, or the power and authority of all of them is revoked, the probate court must issue letters of administration with the will annexed, or otherwise, to the widow, or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as hereinbefore required of administrators, and shall have the like power and authority.

1887 R. S. Sec. 5400.

Section 4092. Resignation, Liability Continues; Appointment of Successor: Any executor or administrator may, at any time, by writing, filed in the probate court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the court shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or

administrator, or of the sureties on his bond, shall not be in any manner discharged, released, or affected, by such appointment or resignation.

1887 R. S. Sec. 5401.

Executor who fails to do what is necessary to protect the estate should be removed, although he may have abstained from doing anything actually wrong.—*Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376. The right of the probate court to accept the resignation of the

administrator is clear; and where his resignation is accepted before the settlement of his account with the estate, this is the only erroneous exercise of jurisdiction, and can not be collaterally attacked.—*Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703 and note.

Section 4093. Acts of Executor Valid until Power Revoked: All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust.

1887 R. S. Sec. 5402.

Section 4094. Transcript of Court, Minutes as Evidence: A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the clerk under his hand and the seal of his court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him and have not been revoked, shall have the same effect in evidence as the letters themselves.

1887 R. S. Sec. 5403.

DISQUALIFICATION OF PROBATE JUDGE.

Section 4095. When Judge Disqualified: No probate court shall admit to probate any will, or grant letters testamentary or of administration, in any case where the judge thereof is interested, as next of kin to the decedent, or as a legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, or is in any other manner interested or disqualified from acting.

1887 R. S. Sec. 5404.

Section 4096. Judge Disqualified, Proceedings Transferred: When a petition is filed in the probate court praying for admission to the probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the probate court for the settlement of an estate, and the presiding judge of the court is disqualified to act from any cause, upon his own or the motion of any person interested in the estate, he must make an order transferring the proceeding to the probate court of an adjoining county; and the clerk of the court ordering the transfer must transmit to the clerk of the court to which the proceeding is ordered to be transferred, a certified copy of the order and all the papers on file in his office in the proceeding; and thereafter the probate court to which the proceeding is transferred shall exercise the same authority and

jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction of the estate.

1887 R. S. Sec. 5405.

Disqualification of judges, general:
Sec. 3029.

Section 4097. Transfer not to Change Right to Administrator, Retransfer: The transfer of a proceeding from one court to another, as provided for in the preceding Section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate in the order hereinbefore provided. If before the administration is closed of any estate so transferred as herein provided, another person is elected or appointed, and qualified as probate judge of the county wherein such proceeding was originally commenced, who is not disqualified to act in the settlement of the estate, and the causes for which the proceeding was transferred no longer exist, any person interested in the estate may have the proceeding returned to the court from which it was originally transferred by filing a petition setting forth these facts and moving the court therefor.

1887 R. S. Sec. 5406.

Section 4098. When Proceedings Returned to Original Court: On hearing the motion, if the facts required by the preceding Section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of parties interested would be promoted by such change, the judge must make an order transferring the proceeding back to the probate court where it was originally commenced; and the clerk of the court ordering the transfer must transmit to the clerk of the court in which the proceeding was originally commenced, a certified copy of the order and all the original papers on file in his office in the proceeding; and the court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all necessary orders and decrees to close up the administration of the estate.

1887 R. S. Sec. 5407.

SUSPENSION AND REMOVAL.

Section 4099. Suspension of Powers of Executor: Whenever the probate judge has reason to believe, from his own knowledge or from credible information that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed or is about to commit, a fraud upon the estate, or is incompetent to act, or has permanently removed from the State, or has wrongfully neglected the estate or has long neglected to perform any act as such executor or administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such executor or administrator until the matter is investigated.

1887 R. S. Sec. 5408.

Neglect by executor: Sec. 4246 et seq.

Removal from state as ground for removal of executor.—See *In re Kelley's Estate*, 122 Cal. 381, 55 Pac. 136.

Section 4100. Notice of Suspension and Citation to Appear: When such suspension is made, notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fails to appear in obedience to the citation, or, if appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked and letters of administration granted anew as the case may require.

1887 R. S. Sec. 5409.

Section 4101. Appearance, Allegation, Answer, Hearing: At the hearing, any person interested in the estate may, appear and file his allegation in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, as hereinbefore provided. The issues raised must be heard and determined by the court.

1887 R. S. Sec. 5410.

Section 4102. Notice to Absconding Executors and Administrators: If the executor or administrator has absconded or concealed himself, or has removed or absented himself from the State, notice may be given him of the pendency of the proceedings by publication in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served.

1887 R. S. Sec. 5411.

Section 4103. May Compel Attendance: In the proceedings authorized by the preceding Sections for the removal of an executor or administrator, the court may compel his attendance by attachment and may compel him to answer questions, on oath, touching his administration, and, upon his refusal so to do, may commit him until he obey, or may revoke his letters, or both.

1887 R. S. Sec. 5412.

CHAPTER CLXXXVIII.

INVENTORY AND COLLECTION OF THE EFFECTS OF DECEDENTS.

INVENTORY AND APPRAISEMENT. Section.

- 4104. Inventory to be returned.
- 4105. Appraisement and pay of appraisers.
- 4106. Oath of appraisers, inventory, how made.
- 4107. Money, inventory to include, appraisement unnecessary.
- 4108. Effect of naming a debtor executor.
- 4109. Discharge or bequest of debt.
- 4110. Oath to inventory.
- 4111. Letters revoked for neglect of administrator.
- 4112. Inventory of after discovered property.

COLLECTION AND CONTROL OF EFFECTS. Section.

- 4113. Executor to possess real and personal estate.
- 4114. To deliver real estate to heirs.
- 4115. Embezzling estate before grant of letters testamentary.
- 4116. Citation to person suspected of embezzlement, etc.
- 4117. Procedure, penalty, damages, order and commitment.
- 4118. Persons entrusted with estate, cited to account.

INVENTORY AND APPRAISEMENT.

Section 4104. Inventory to be Returned: Every executor or administrator must make and return to the court, at its first term after his appointment, a true inventory and appraisement of all the estate of the decedent, including the homestead, if any, which has come to his possession or knowledge.

1887 R. S. Sec. 5420.

Section 4105. Appraisement and Pay of Appraisers: To make the appraisement, the probate judge or court must appoint three disinterested persons (any two of whom may act), who are entitled to receive a reasonable compensation for their services, not to exceed four dollars per day, to be allowed by the court or judge. The appraisers must, with the inventory, file a verified account of their services and disbursements. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed, either by the probate judge, having jurisdiction of the estate, or by the probate judge of such other county, on request of the judge having jurisdiction.

1887 R. S. Sec. 5421.

Section 4106. Oath of Appraisers; Inventory, how Made: Before proceeding to the execution of their duty, the appraisers, before any officer authorized to administer oaths, must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly, and impartially appraise the property exhibited to them, or which shall come to their knowledge, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in dollars and cents, in figures, opposite to the articles respectively; the inventory must contain all the estate of the decedent, real and personal, a statement of all debts, partnerships, and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon (if any), with their dates, and the sum which, in the judgment of the appraiser, may be collected on each debt, interest, or security; the inventory must show, so far as the same can be ascertained by the executor or the administrator what portion of the property is community property and what portion is the separate property of the decedent.

1887 R. S. Sec. 5422.

Section 4107. Money, Inventory to Include. Appraisement Unnecessary: The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator, and if none, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisement, but an inventory must be made and returned as in other cases.

1887 R. S. Sec. 5423.

Section 4108. Effect of Naming a Debtor Executor:

The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claims must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due.

1887 R. S. Sec. 5424.

Section 4109. Discharge of Bequest of Debt:

The discharge or bequest in a will, of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the demand or debt. It must be included in the inventory, and, if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

1887 R. S. Sec. 5425.

Section 4110. Oath to Inventory:

The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge or possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory.

1887 R. S. Sec. 5426.

Section 4111. Letters Revoked for Neglect of Administrator:

If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall, for reasonable cause, allow, the court may, upon notice revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure.

1887 R. S. Sec. 5427.

Graber's Estate, 111 Cal. 434, 44 Pac.

This section in the power it confers 165.
on the court is directory merely.—In re

Section 4112. Inventory of After Discovered Property:

Whenever property of more than two hundred and fifty dollars in value, not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this chapter, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced after notice, by attachment or removal from office.

1887 R. S. Sec. 5428.

COLLECTION AND CONTROL OF EFFECTS.

Section 4113. Executor to Possess Real and Personal Estate:

The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate, until the estate is settled, or until delivered over by order of the probate court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings, and fixtures thereon, which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate or for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be construed as requiring them so to do.

1887 R. S. Sec. 5429.

Both real and personal property of intestate vests in heir, subject to the lien of the administrator for the payment of debts and the expenses of administration, and with the right in the administrator of present possession.—Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237.

The title of the heirs of a deceased person to real estate owned by him does not originate in the decree of distribution, but comes to them directly from their ancestor, subject only to the control of the probate court, and the possession of the administrator appointed by that court for the purpose of administration.—Bates v. Howard, 105 Cal. 183, 38 Pac. 715.

SOURCE OF TITLE OF HEIRS:

Section 4114. To Deliver Real Estate to Heirs: Unless it satisfactorily appears to the probate court, that the rents, issues and profits of the real estate for a longer period, are necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, at the end of the time limited for the presentation of claims against the estate, the court must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or devisees.

1887 R. S. Sec. 5430.

Section 4115. Embezzling Estate Before Grant of Letters Testamentary:

If any person before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is chargeable therewith and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

1887 R. S. Sec. 5431.

Sections 4115 to 4118 are remedial and not penal in their character, though providing redress in the way of imprisonment and damages under certain contingencies, as a means of enforcing the civil remedy provided for in those sections and are not in conflict with constitutional provisions which pro-

vide that no person shall be compelled to be a witness against himself, in a criminal case, and that the right of the people to be secured in their persons, houses, papers, and effects against unreasonable seizures and searches, can not be violated.—Levy v. Superior Court, 105 Cal. 600, 38 Pac. 965.

Section 4116 Citation to Person Suspected of Embezzlement, etc.:

If any executor, administrator or other person interested in the estate of a decedent, complains to the probate judge on oath, that any person is suspected to have concealed, embezzled,

smuggled, conveyed away or disposed of any moneys, goods or chattels of the decedent or has in his possession or knowledge, any deeds, conveyances, bonds, contracts or other writings which contain evidences of, or tend to disclose the right, title, interest or claim of the decedent to any real or personal estate, or any claim or demand, or any last will. The judge may cite such person to appear before the probate court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where letters have been granted, he may be cited and examined, either before the probate court of the county where he is found, or before the court issuing the citation. But if in the latter case he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

1887 R. S. Sec. 5432.

Section 4117. Procedure, Penalty, Damages, Order and Commitment: If the person so cited refuse to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If upon such examination it appears that he has concealed, embezzled, smuggled, conveyed away or disposed of any moneys, goods or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings tending to disclose the right, title, interest or claim of the decedent to any real or personal estate, claim or demand, or any last will of the decedent, the probate court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail there to remain until the order is complied with or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and be filed in the probate court. The order for such disclosure made upon such examination, is primary evidence of the right of such administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property, and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

1887 R. S. Sec. 5433.

Section 4118. Persons Entrusted with Estate, Cited to Account: The probate judge, upon the complaint, on oath, of any executor or administrator, may cite any person who has been entrusted with any part of the estate of the decedent, to appear before such court, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other property or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of his proceedings

thereon; and if the person so cited refuses to appear and render such account, the court may proceed against him as provided in the preceding section.

1887 R. S. Sec. 5434.

CHAPTER CLXXXIX.

PROVISIONS FOR SUPPORT OF FAMILY AND THE HOMESTEAD.

Section.

SUPPORT OF FAMILY.

- 4119. Widow and minor children remain in decedent's house.
- 4120. Property exempt from execution, set apart for family.
- 4121. May make extra allowance.
- 4122. Payment of allowances.
- 4123. Apportionment between survivors and children.
- 4124. Estate less than fifteen hundred dollars, summarily administered.
- 4125. When all property to go to children.

Section.

HOMESTEAD.

- 4126. Homestead rights of survivor to homestead.
- 4127. Homestead set off, liens paid by estate.
- 4128. Procedure, homestead worth over five thousand dollars.
- 4129. Report of appraisers.
- 4130. Confirming or rejecting report of appraisers.
- 4131. Costs, to whom chargeable.
- 4132. Certified copies of orders to be recorded.

SUPPORT OF FAMILY.

Section 4119. Widow and Minor Children Remain in Decedent's House: When a person dies leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be allowed by the probate judge.

1887 R. S. Sec. 5440.

Section 4120. Property Exempt from Execution, Set Apart for Family: Upon the return of the inventory, or at any subsequent time during the administration, the court or the probate judge may, on his own motion or on petition therefor, set apart for the use of the surviving husband or wife, or the minor children of the decedent, all property exempt from execution, including the homestead selected, designated, and recorded. If none has been selected, designated, and recorded, the judge of the court must select, designate, set apart, and cause to be recorded, a homestead for the use of the persons hereinbefore named in the manner provided in this chapter, out of the real estate belonging to the decedent.

1887 R. S. Sec. 5441.

Homestead, setting apart: Sec. 4120.

HOMESTEAD, RIGHTS OF WIDOW:

Under the homestead laws of Idaho, p. 627, Rev. Laws, Edition of 1874-75, a widow may select a homestead after the death of her husband under Section 1 of said act and have the same set apart by the probate court for the bene-

fit of herself and children under Section 4 of said act. The widow is the head of a family, in contemplation of the first section of said act, and the benefits of the act are secured to her, as a wife surviving her husband, by Section 4 of said act.—*Coughanour v. Hoffman's Estate*, 2 Idaho, 267, 13 Pac. 231.

Section 4121. May Make Extra Allowance: If the amount set apart be insufficient for the support of the widow and children, or either, the probate court or judge must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate; which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration.

1887 R. S. Sec. 5442.

ALLOWANCE FOR SUPPORT OF WIDOW: The widow of a decedent is entitled to a reasonable allowance for her support. The court, in making this allowance, should take into consideration all the circumstances bearing upon the reasonableness of the amount allowed, regard being had to the mode in which she lived during the lifetime of her husband, and the sufficiency of the estate to pay the amount allowed. The court is not bound to limit such amount to a bare support of the widow. When the court has granted an order making

an allowance for the support of a widow of a decedent, and the time in which an appeal may be taken from such order has been allowed to pass, the court cannot review the order. Its power over it is at an end, though it may be that if the court was imposed upon by a studied withholding of the facts bearing upon the subject matter of the inquiry, it may so change the order as to make it conformable to what would have been a fair determination on the facts withheld being made to appear.—Estate of Stevens, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252.

Section 4122. Payment of Allowances: Any allowance made by the court or judge, in accordance with the provisions of this chapter, must be paid in preference to all other charges except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

1887 R. S. Sec. 5443.

Section 4123. Apportionment Between Survivors and Children: When property is set apart to the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow or surviving husband, the whole belongs to the minor child or children. If the property set apart be a homestead, selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased subject to such order.

1887 R. S. Sec. 5444.

Section 4124. Estates Less than Fifteen Hundred Dollars, Summarily Administered: If, upon the return of the inventory of the estate of a deceased person, it shall appear therefrom that the value of the whole estate does not exceed the sum of fifteen hundred dollars, and if there be a widow or minor children of the deceased, the court or a judge thereof shall, by order, require all persons interested to appear on a day fixed, to show cause

why the whole of said estate should not be assigned for the use and support of the family of the deceased. Notice thereof shall be given and proceedings had in the same manner as upon the settlement of accounts of executors and administrators. If, upon the hearing, the court finds that the value of the estate does not exceed the sum of fifteen hundred dollars, it shall, by a decree for that purpose, assign for the use and support of the widow and minor children, if there be a widow and minor children, and if no widow, then for the children, if there be any, and if no children, then for the widow, the whole of the estate, after the payment of the expenses of the last illness of the deceased, funeral charges and expenses of administration, and there must be no further proceedings in the administration, unless further estate be discovered; and when it so appears that the value of the whole estate does not exceed the sum of fifteen hundred dollars, it is in the discretion of the probate judge to dispense with the regular proceedings, or any part thereof, prescribed in this title, and there must be had a summary administration of the estate, and an order of distribution thereof at the end of six months after the issuing of letters; the notice to creditors must be given to present their claims within four months after the first publication of such notice, and those not so presented, are barred as in other cases.

1887 R. S. Sec. 5445.

Section 4125. When all Property to go to Children:

If the widow has a maintenance derived from her own property equal to the portion set apart to her by the preceding sections of this chapter, the whole property so set apart, other than her half of the homestead, must go to the minor children.

1887 R. S. Sec. 5446.

HOMESTEAD.

Section 4126. Rights of Survivor to Homestead: If the homestead selected by the husband and wife or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the probate court to assign it for a limited period, to the family of the decedent. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them previous to or at the time of the death of such husband or wife, except in satisfaction of judgments obtained:

1. Before the declaration of homestead was filed for record and which constitute liens upon the premises;

2. On debts secured by mechanics,' laborers' or vendors' liens upon premises;

3. On debts secured by mortgages on the premises, executed and acknowledged for any portion of the purchase price thereof, or by the husband and wife, or by an unmarried claimant;

4. On debts secured by mortgages on the premises executed and recorded before the declaration of homestead was filed for record.

1887 R. S. Sec. 5447.

PROBATE HOMESTEAD, TESTATOR HAS NO TESTAMENTARY POWER OVER: If the statute provides for the selection by the probate court of property to be used for a homestead by the family of the decedent, and that if such selection be from the separate estate of the decedent, the court can set it aside for a limited period only, to be designated in such order, the order excludes the property so selected from the testamentary power of the husband, and it descends to his heirs, regardless of any devise he may have made.—*In re Wakerly*, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97.

HOMESTEAD, DEFECTIVE DECLARATION: A declaration of homestead made by a wife, which fails to contain a statement "showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit," is ineffective to impress the land with the incidents of a homestead.—*Cunha v. Hughes*, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27.

Homestead in community property vests on the death of a wife in her husband without administration, and subject to no other liability than such as has been created under the provisions of the law of homesteads. The death of one of the spouses does not in any way alter the estate or the character of the homestead. A probate homestead cannot be set apart out of property which could not have been dedicated as a homestead immediately preceding the death of decedent. A probate homestead cannot be set aside where there exists at the death of the decedent a homestead duly dedicated, though such homestead has been sold by the survivor before the application for the probate of the homestead is made.—*In re Ackerman*, 80 Cal. 208, 22 Pac. 141, 13

Am. St. Rep. 116; see also note 21 Am. St. Rep. 28.

ORDER SETTING APART HOMESTEAD TO WIDOW, ACTION TO ANNUL: An order setting apart a homestead to the widow of the decedent, no homestead having been declared during the lifetime of the deceased operates to vest in her a title to the land set apart out of the community property. It is in the nature of a judgment in rem, is conclusive upon all persons interested in the estate, if the court has jurisdiction to pronounce it, and can be successfully attacked in equity only upon the same grounds that a judgment in personam may be annulled.—*Fealey v. Fealey*, 104 Cal. 354, 38 Pac. 49, 43 Am. St. Rep. 111. As to relief in equity from judgments at law see note 43 Am. St. Rep. 117.

HOMESTEAD, JUDGMENT AND EXECUTION LIEN UPON: Though a homestead is in value largely in excess of the amount allowed by law, the levy of an execution upon it does not create a lien. Its operation is confined to serving as a foundation for proceedings under the statute for the ascertainment of the value of the property covered by the declaration of homestead, and the procurement of an order of court for the partition and sale thereof, and the application of the excess to the satisfaction of the judgment. If one has a judgment against the estate of a decedent, under which a levy has been made on a homestead in his lifetime, the plaintiff must present his claim upon such judgment to the administrator and procure its allowance, and is not entitled to proceed to have the homestead appraised and sold or partitioned, and the excess above the amount of the homestead exemption applied to the payment of the judgment.—*Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26 and note.

Section 4127. Homestead Set off; Liens Paid by Estate: If the homestead selected and recorded prior to the death of the decedent is returned in the inventory, appraised at not exceeding five thousand dollars in value, the probate court must, by order, set it off to the persons in whom title is vested by the preceding section. If there are subsisting liens or incumbrances on the homestead, they must be paid out of the funds of the estate, if there re-

main sufficient for that purpose, after the payment of all claims allowed against the estate.

1887 R. S. Sec. 5448.

Section 4128. Procedure; Homestead Worth over Five Thousand Dollars: If the homestead, as selected and recorded, be appraised at more than five thousand dollars, the appraisers must, before they make their return determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must admeasure and set apart to the parties entitled thereto such portion of the premises, including the dwelling house, as will amount in value to the sum of five thousand dollars, and make report thereof, giving the metes, bounds and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of five thousand dollars, and that they cannot be divided without material injury, they must report such finding, and thereafter the court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto.

1887 R. S. Sec. 5449.

The court can not set apart as a homestead to surviving husband or wife property of the estate which could not have been selected as a homestead during the continuance of the marriage. The court cannot set apart homestead to the value of five thousand dollars to the surviving husband or wife, out of an estate consisting of a lot and four storied building, erected and used exclusively for business purposes, and valued at twenty-five thousand dollars, and which cannot be divided without material injury. Where no homestead

has been selected during the lifetime of the husband or wife, and there is no property out of which the survivor may select a homestead, the court cannot order a sum of money paid to such survivor in lieu of a homestead. Where homestead selected during lifetime of husband or wife is inventoried at more than five thousand dollars, and a homestead to that amount can not be carved out of it, the court may order the sale of the homestead as selected, and pay to the survivor that amount of the proceeds.—Estate of Noah, 73 Cal. 590, 15 Pac. 290, 2 Am. St. Rep. 834.

Section 4129. Report of Appraisers: Any two of the appraisers concurring, may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed.

1887 R. S. Sec. 5450.

Section 4130. Confirming or Rejecting Report of Appraisers: When a report of the appraisers is filed, the court must set a day for hearing any objections thereto, from any one interested in the estate. Notice of the hearing must be given for such time and in such manner as the court may direct. If the court be satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court may appoint new appraisers to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of their report as upon the first report.

1887 R. S. Sec. 5451.

Section 4131. Costs, to whom Chargeable: The costs of all proceedings in the probate court provided for in this chapter, must be paid by the estate as expenses of administration. Persons succeeding by purchase, or otherwise, to the interests, rights and title of successors to homesteads, or to the right to have homesteads set apart to them as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire.

1887 R. S. Sec. 5452.

Section 4132. Certified Copies of Orders to be Recorded: A certified copy of every final order made in pursuance of this chapter, by which a report is confirmed, property assigned or sale confirmed, must be recorded in the office of the recorder of the county where the homestead property is situated.

1887 R. S. Sec. 5453.

CHAPTER CXC.

CLAIMS AGAINST THE ESTATE.

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NOTICE AND LIMITATION.

Section 4133. Notice to Creditors: Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice. Such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks. The court or judge may also direct additional notice by

publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation: *Provided*, That when no newspaper is published in the county, the notice shall be posted in not less than three public places in the county, one of which shall be at the court house door, for such time, not less than four weeks, as the court may order.

1887 R. S. Sec. 5460.

Additional notice cannot be given after the time for presenting claims has

expired.—*Johnston v. Superior Court*, 105 Cal. 666, 39 Pac. 36.

Section 4134. Time Expressed in Notice: The time expressed in the notice must be ten months after its first publication, when the estate exceeds in value the sum of fifteen hundred dollars, and four months when it does not.

1887 R. S. Sec. 5461.

Section 4135. Copy and Proof of Notice Filed, Order Made: After the notice is given, as required in the preceding section, a copy thereof, with the affidavit of due publication or of publication and posting must be filed and upon such affidavit or other testimony to the satisfaction of the court, an order or decree showing that due notice to creditors has been given, and directing that such order or decree be entered in the minutes and recorded, must be made by the court.

1887 R. S. Sec. 5462.

Section 4136. Time within which Claims Must be Presented: All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever: *Provided, however*, That when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or a judge thereof that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered.

1887 R. S. Sec. 5463.

Claims: By probate judge: Sec. 4138.

By executor: Sec. 4152.

Claims allowed not affected by statute of limitations: Sec. 4203.

Claims secured by lien on homestead to be presented: Sec. 4127.

Presentation of claim to administrator is commencement of suit, and is sufficient to stop the running of the statute of limitations.—*Beckett v. Seelover*, 7 Cal. 215, 68 Am. Dec. 237.

A creditor of a corporation may maintain suit against the personal

representatives of deceased subscriber to capital stock to compel the payment of the unpaid subscription of the decedent without presenting the claim to the representatives for allowance as ordinary claims are required to be presented. Such unpaid subscriptions are a trust fund for the benefit of creditors and the deceased stockholder is a trustee, and not a debtor, of the corporation's creditors. — *Thompson v. Reno Savings Bank*, 19 Nev. 242, 9 Pac. 121, 3 Am. St. Rep. 883.

PRESENTATION AND ALLOWANCE OR REJECTION.

Section 4137. Claims, Presentation for Allowance; Interest: Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the

claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate be insolvent, no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the district court.

1887 R. S. Sec. 5464.

Section 4138. Probate Judge may Present Claim, Action Thereon: Any probate judge may present a claim against the estate of a decedent, for allowance, to the executor or administrator thereof; and if the executor or administrator allows the claim, he must, in writing, designate some probate judge of an adjoining county, who, upon the presentation of such claim to him, is vested with the same power to allow or reject it as he would have if the will had been proved or administration granted in his own county; and the probate judge presenting such claim, in case of its rejection by the executor or administrator, or by such probate judge as shall have acted upon it, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected.

1887 R. S., Sec. 5465.

Section 4139. Allowance and Rejection of Claims: When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allows the claim, it must be presented to the probate judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection; and if the presentation be made by a notary, the certificate of such notary, under seal, is primary evidence of such presentation and rejection. If the claim be presented to the executor or administrator, before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time.

1887 R. S. Sec. 5466.

Section 4140. Approved Claims Filed, Security Described. Lost Claims: Every claim allowed by the executor or administrator, and approved by the probate judge or a copy

thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the probate court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim is founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited if demanded, unless it is lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim or any part thereof is secured by a mortgage or other lien which has been recorded in the office of the recorder of the county in which the land affected by it lies, it is sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest and date of allowance.

1887 R. S. Sec. 5467.

It is not inconsistent with the continuance of a judgment lien, after the death of the judgment debtor, that the judgment must, as required by law, be presented as a claim against the estate of the judgment debtor, to be paid in the due course of administration, and

that it is not enforceable by execution. The presentation and allowance of a judgment as a claim against the estate of the judgment debtor does not destroy the lien of the judgment by merger in the allowance of the claim or otherwise. —Morton v. Adams, 124 Cal. 229, 56 Pac. 1038, 71 Am. St. Rep. 53.

Section 4141. Claims Barred by Statute of Limitations: No claim must be allowed by the executor or administrator, or by the probate judge, which was barred by the statute of limitations, at the time of the death of the decedent. When a claim is presented to the probate judge for his allowance, he may, in his discretion, examine the applicant and others, on oath, and hear any other legal evidence touching the validity of the claim.

1887 R. S. Sec. 5469.

Where the beneficiary of a fund received by a decedent as trustee is obliged to present his claim for allowance, because unable to trace the specific trust property into the possession of the representatives, the statute of

limitations, in the absence of a repudiation of the trust by deceased in his lifetime, begins to run from the time of the first publication of the notice to creditors.—McGrath v. Carroll, 110 Cal. 84, 42 Pac. 466.

ACTION ON, AGAINST ESTATE.

Section 4142. Rejected Claims; Action within Three Months: When a claim is rejected, either by the executor or administrator, or the probate judge, the holder must bring suit in the proper court against the executor or administrator, within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim is forever barred.

1887 R. S. Sec. 5468.

Only such claims as arise on contract are required to be so filed and rejected

before suit brought.—Hardin v. Sin Claire, 115 Cal. 464, 47 Pac. 363.

Section 4143. Claims Must be Presented before Suit: No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint.

1887 R. S. Sec. 5470.

An action against an administrator of an estate to declare a vendor's lien on certain property sold by plaintiff to the intestate is not a claim that must be presented to the administrator for rejection or allowance before action is brought within the meaning of probate practice act Section 138 requiring such presentation.

Note.—This section amends section cited by adding exception in line with decision.—*Toulouse v. Burkett*, 2 Idaho, 170, 10 Pac. 26.

If a mortgage is executed by husband and wife upon a homestead which is afterwards set apart to the surviving spouse, the mortgagee can neither maintain his action to foreclose, nor have a personal judgment against the survivor, unless he first presents his claim against the estate of the deceased spouse.—*Hibernia Sav. & L. Soc. v. Thornton*, 109 Cal. 427, 42 Pac. 447, 50 Am. St. Rep. 52.

Mortgagee need not present his claim against the husband's estate if he waives all demands against the estate, where the mortgage to secure the husband's debt is of a homestead upon the separate property of the wife.—*Bull v. Cole*, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235.

Administrator cannot pay out money of the estate to remove incumbrances from the property, unless the intestate was bound to pay the money; although

a court of chancery might authorize the expenditure to prevent a sacrifice. An administrator acts upon his own responsibility if he undertakes to go beyond the strict line of his duty as the law defines it, and while he can receive no profit from a successful issue of his investment, he must bear the loss of failure.—In the *Matter of the Estate of Knight*, 12 Cal. 200, 73 Am. Dec. 531.

An action will lie to foreclose a mortgage against the estate of a deceased mortgagor, although the debt secured by the mortgage has been presented and duly allowed, but no judgment can be entered up for any deficiency which may remain after the application of the proceeds of the sale. An allegation of the presentment of the claim is unnecessary, in an action to enforce specific liens and equitable rights against an estate. The term "claim" as used in the statute regulating the settlement of estates of decedents, refers only to such debts or demands against the decedent as might by action be reduced to simple money judgments, and does not embrace mortgage liens.—*Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140 and note.

In an action upon a rejected claim against the representatives of a deceased person, the plaintiff can only recover upon the claim presented and rejected, and is not entitled to recover against the executor for any other cause of action.—*Lichtenberg v. McGlynn*, 105 Cal. 45, 38 Pac. 541.

Section 4144. Time of Limitation: The time during which there shall be a vacancy in the administration, must not be included in any limitations herein prescribed.

1887 R. S. Sec. 5471.

Section 4145. Allowance of Claim in Part: Whenever any claim is presented to an executor or administrator, or to the probate judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor, brought against the executor or administrator, unless he recovers a greater amount than that offered to be allowed.

1887 R. S. Sec. 5473.

ACTION AGAINST ADMINISTRATOR, ADMISSIONS: Admissions of an

administrator made in the allowance of a claim against the estate, although the claim was only allowed in part, binds

the estate.—*Meinert v. Snow*, 2 Idaho, 851, 27 Pac. 677.

Heir may dispute validity of claim upon which a petition for the sale of real estate of a decedent is based, upon an application to sell such real estate

for the payment of debts, although such claims may have been allowed by the public administrator and by the probate judge.—*Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237.

Section 4146. Effect of Judgment Against Executor:

A judgment rendered against an executor or administrator upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner, as if it had been allowed by the executor or administrator and the probate judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due. A certified transcript of the judgment must be filed in the probate court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate or give to the judgment creditor any priority of payment.

1887 R. S. Sec. 5474.

A judgment in rem against real or personal property in hands of personal representatives, heirs, trustees, etc., may be satisfied on execution: Sec. 3532, Sub. 2.

A judgment against an administrator of a deceased person in one state is no evidence of debt in a subsequent action by the same person in another state against an administrator, whether the same or a different person, appointed there, or against any other person having assets of deceased. An administrator under a grant of administration in one state is not a privy in law nor in estate to an administrator in another state. An administrator has no authority to act for or bind the estate

outside of the jurisdiction of the state of his appointment, and therefore cannot be bound by a judgment entered against an administrator of the same estate in another state on the ground that he participated in the defense of the action in the other state.—*Braithwaite v. Harvey*, 14 Mont. 208, 36 Pac. 38, 43 Am. St. Rep. 625.

A judgment of foreclosure against surviving wife sued solely as executrix of her deceased husband does not affect her individual rights in the mortgaged premises as a homestead, notwithstanding she sets up in her answer the fact of her declaration of homestead on the property.—*Building and Loan Assn. v. Chalmers*, 75 Cal. 332, 17 Pac. 229, 7 Am. St. Rep. 173 and note.

REFERENCE OF CLAIMS.

Section 4147. May Refer Doubtful Claims; Effect of: If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy to some disinterested person, to be approved by the probate judge. Upon filing the agreement and approval of the probate judge in the office of the clerk of the district court for the county in which the letters testamentary or of administration were granted, the clerk must, either in vacation or in term, enter a minute of the order referring the matter in controversy to the person so selected; or, if the parties consent, a reference may be had in the probate court; and the report of the referee, if confirmed, establishes or rejects the claim, the same as if it had been allowed or rejected by the executor or administrator and the probate judge.

1887 R. S. Sec. 5477.

Section 4148. Trial by Referee, how Confirmed, Effect: The referee must hear and determine the matter, and

make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation and subject to the same control, as in other cases of reference. The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudging costs, as in actions against executors or administrators, and the judgment of the court thereon, shall be as valid and effectual, in all respects as if the same had been rendered in a suit commenced by ordinary process.

1887 R. S. Sec. 5478.

ACTION PENDING AND JUDGMENT.

Section 4149. Action Pending at Time of Decease:

If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentation required.

1887 R. S. Sec. 5472.

Revised Laws, page 267, Sec. 140 providing that if any action be pending against the testator or intestate at the time of his death the plaintiff shall present his claim to the executor or administrator for allowance or rejection and no recovery shall be had in the action unless proof be made of the presentation, applies to actions in which the United States is a party plaintiff.—United States v. Hailey, 2 Idaho, 26, 3 Pac. 263.

DEATH OF DEFENDANT DESTROYS ATTACHMENT LIEN: If the defendant die after the levy of an attachment upon his property, and be-

fore judgment, his death destroys the lien of the attachment, and the attached property passes into the hands of the administrator, to be administered upon in the due course of administration. The court cannot render a judgment, enforcing the lien of the attachment by a sale of the attached property, and an application of the proceeds to the payment of the demand.—Myers v. Moot, 29 Cal. 359, 89 Am. Dec. 49.

Supplemental complaint should be filed in the action alleging the death of decedent and due presentation of the claim.—Falkner v. Hendy, 107 Cal. 49, 40 Pac. 21 and 386.

Section 4150. What Judgment is not a Lien: A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration.

1887 R. S. Sec. 5476.

See also Sec. 3508.

Section 4151. Execution to Issue after Death: When any judgment has been rendered for or against the testator or intestate in his lifetime, no execution shall issue thereon after his death, except as provided in Title XVI of this Code. A judgment against the decedent for the recovery of money, must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under fore-

closure or execution in like manner and with like effect, as if the judgment debtor was still living.

1887 R. S. Sec. 5475.

On the death of a husband, community property of himself and his wife, held by them as their homestead, vests in her, and is protected as her homestead to the same extent as before his death. If one has a judgment against the estate of a decedent, under which a levy has been made on a homestead in his lifetime, the plaintiff must present his claim upon such judgment to the administrator and procure its allowance, and is not entitled to proceed to have the homestead appraised and sold or partitioned, and the excess above the

amount of the homestead exemption applied to the payment of the judgment.—*Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26.

A decree in a divorce suit granting an absolute divorce providing that the mother shall have the care and custody of the minor children, and the father shall pay a certain sum monthly toward their support during their minority, is not discharged nor annulled by the death of the father. Its performance may be enforced thereafter out of his estate.—*Murphy v. Moyle*, 17 Utah, 113, 53 Pac. 1010, 70 Am. St. Rep. 767.

CLAIMS OF EXECUTORS AND ADMINISTRATORS.

Section 4152. Claims of Executor, Etc., Against

Estate: If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavits, must be presented for allowance or rejection to the probate judge, and its allowance by the judge is sufficient evidence of its correctness, and it must be paid as other claims, in due course of administration. If, however, the probate judge rejects the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the probate judge, who may appoint an attorney at the expense of the estate, to defend the action. If the claimant recovers no judgment he must pay all costs, including defendant's attorney's fees.

1887 R. S. Sec. 5480.

GENERAL PROVISIONS.

Section 4153. Executor Neglecting Notice to Creditors, Removed:

If an executor or administrator neglects for two months after his appointment to give notice to creditors, as prescribed by this Chapter, the court must revoke his letters, and appoint some other person in his stead equally or the next in order entitled to the appointment.

1887 R. S. Sec. 5481.

Section 4154. Executor to Return Statement of

Claims: At the same term at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court; and from term to term thereafter he must present a statement of claims subsequently presented to him. In all statements he must designate the names of the creditors, the nature of each claim, when it becomes due or will become due, and whether it was allowed or rejected by him.

1887 R. S. Sec. 5482.

Section 4155. Payment of Interest on Claims: If there be any debt of the decedent bearing interest, whether presented

or not, the executor or administrator may, by order of the court, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This Section does not apply to existing debts, unless the creditor consent to accept the amount.

1887 R. S. Sec. 5483.

Where demand presented to administrator does not claim interest, none can be allowed, unless, perhaps, upon its face the paper showed that interest resulted as a matter of course from the facts stated as constituting the claim.--

Aguirre v. Packard, 14 Cal. 171, 73 Am. Dec. 645.

This section is designated not for the benefit of the creditors, but for the benefit of the estate. It affords no right to the owner of such a debt to compel an advance payment of it.—In re Hope, 106 Cal. 153, 39 Pac. 523.

CHAPTER CXCI.

SALES AND CONVEYANCES OF PROPERTY OF DECEDENT.

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PROPERTY SUBJECTED. CONDITIONS, AUTHORIZATION AND PROCEDURE.

Section 4156. Personal Estate First Chargeable, Real Estate, when Sold: The personal estate of the decedent which comes into the hands of the executor or administrator is first chargeable with the payment of the debts and expenses; if the goods, chattels, rights and credits in the hands of the executor or administrator are not sufficient to pay the debts of the decedent, the expenses of administration, and the allowance to the family, the whole of the real estate may be sold for that purpose by the executor or administrator.

1887 R. S. Sec. 5490.

Section 4157. Sale of Personal in Lieu of Real Property: Whenever it appears to the court on any hearing of an application for the sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such personal property should be first sold, the court may decree the sale of such personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance.

1887 R. S. Sec. 5604.

Section 4158. No Sales Valid, Except by Order Probate Court: No sale of any property of an estate of a decedent is valid unless made under order of the probate court, except as otherwise provided in this Chapter. All sales must be reported under oath, and confirmed by the probate court before the title of the property sold passes.

1887 R. S. Sec. 5491.

Under the provisions of Section 5491, Rev. St., all sales made by an administrator of the estate of a deceased person must be reported under oath to, and confirmed by, the probate court, before the title of the property sold passes, nor can the administrator legally convey the title until such report and confirmation are made.—*People ex rel. Chemung Min. Co. v. Cunningham* (Idaho), 53 Pac. 451.

Provisions of statute regulating the settlement of estates of decedents, declaring that no sale of any property shall be valid unless made upon an order of the probate court, are applicable to sales by executors and administrators only, and do not refer to judicial

sales under decrees of court, nor to sales in pursuance of testamentary authority. —*Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140.

Sale by executor without order of court under a will containing no power to him to sell is void. A purchaser, with knowledge at such sale can claim no estoppel in pais against the heirs from acquiescence nor is he entitled to subrogation against the heirs, especially when he has made his payments to the executor and trustees, who have used the money indiscriminately with other moneys. In an action to recover land from such purchaser no allowance can be made for improvements under Section 3382, ante.—*Huse v. Den*, 85 Cal. 390, 24 Pac. 790, 20 Am. St. Rep. 232.

If an executor having authority to sell real property at public auction receives a bid for it at private sale, together with a deposit of money on account of such bid, his action in so doing is entirely unauthorized, and cannot be regarded as in his official capacity. The

estate, therefore, cannot be held liable for such deposit, unless it is shown to have been actually made a part of the assets of the estate by being used for its benefit, or accounted to for it.—*Schlicker v. Hemenway*, 110 Cal. 579, 42 Pac. 1063, 52 Am. St. Rep. 116 and note.

Section 4159. Applications for Orders of Sale, etc:

All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and, upon the hearing, any person interested in the estate may file his written objections which must be heard and determined. A failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale.

1887 R. S. Sec. 5492.

Section 4160. But one Petition, Order, and Sale had,

When: When it appears to the court that the estate is insolvent, or that it will require a sale of all the property of the estate, of every character, to pay the family allowance, expenses of administration, and debts, there need be but one petition filed, but one order of sale made, and but one sale had, except in the case of perishable property, which may be sold as provided in the next section. The probate court, when a petition for the sale of any property, for any of the purposes herein named, is presented, must inquire fully into the probable amount required to make all such payments, and if there be no more estate than sufficient to pay the same, may require but one proceeding for the sale of the entire estate. In such case the petition must set forth substantially the facts required in a petition for the sale of real estate.

1887 R. S. Sec. 5493.

Section 4161. Perishable and Depreciating Property:

At any time after receiving letters the executor, administrator, or special administrator, may apply to the court or judge and obtain an order to sell perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator, or special administrator is responsible for the property, unless, after making a sworn return, and on a proper showing, the court shall approve the sale.

1887 R. S. Sec. 5494.

SALE OF PERSONAL PROPERTY.

Section 4162. Order to Sell Personal Property:

If claims against the estate have been allowed and a sale of property is necessary for their payment or the expense of administration, the executor, or administrator may apply for an order to sell so much of the

personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application, either in vacation or term, from time to time, so long as any personal property remains in his hands and sale thereof is necessary. If it is made to appear for the best interests of the estate, he may at any time after filing the inventory, in like manner and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, whether necessary to pay debts or not.

1887 R. S. Sec. 5495.

Section 4163. Partnership Interests and Choses in Actions:

Partnership interests or interests belonging to any estate by virtue of any partnership formerly existing, interest in personal property pledged, and choses in action, may be sold in the same manner as other personal property when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner if in the county and able to be present in court.

1887 R. S. Sec. 5496.

The executors of an estate of a deceased person have no authority to sell and transfer notes belonging to de-

ceased except under the provisions of Sec. 4158.—*Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118.

Section 4164. Order of Sale, what to Direct, etc.:

If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interest of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, the court or judge must so direct; and such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold. Articles bequeathed must not be sold to pay debts or family allowance, until all other personal estate has been applied to the payment thereof.

1887 R. S. Sec. 5497.

Section 4165. Sale of Personal Property: The sale of personal property must be made at public auction, and after public notice, given for at least ten days, by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold; unless for good reason shown, the probate court or judge orders a private sale, or a shorter notice. Public sales shall not be made of any property which is not present at the time of selling it, unless the court otherwise order.

1887 R. S. Sec. 5498.

MINING PROPERTY.

Section 4166. When Estate Consists of Mines: When the estate of any decedent consists, in whole or in part, of mines or interests in mines in this State, the same may be sold under the order of the probate court having jurisdiction of the estate.

When the decedent, at the time of his death, was not a citizen of this State, but had mining interests herein, the probate court of any county in this State, in which such mining interests are situated, may, upon a proper petition of an heir at law of such decedent, or of any of his co-owners or mining partners in any of said mining interests, or of any person having any interest in such mining properties, or in the estate, appoint an administrator, who shall give bonds as required by the court; that the probate court first acquiring jurisdiction has exclusive jurisdiction of the administration of all of decedent's mining interests in this State, and that after such appointment of an administrator of such non-resident decedent, creditors may present and prove their claims as in other cases, but within such time as the court may order.

The probate court may, when it shall appear that the decedent has no creditors in this State, or, when for other cause it shall seem best to the court, permit decedent's foreign administrator or representative to file certified copies of his letters or authority to represent the estate, and thereafter he has all the authority of an administrator appointed under the laws of this State.

1887 R. S. Sec. 5499; amended 1899, 5th Ses. p. 377.

Section 4167. Petition of Sale. Mining Interests: In the administration of the estate of any decedent the administrator, or other proper legal representative thereof, or any heir at law, or creditor of the decedent, or any of his co-owners or mining partners in mines or mining interests, or any member of any mining partnership, or mining company in which shares or stocks were held by deceased, may file in the proper probate court a written petition describing the mine, interests, or shares which it is desired to sell, and the condition and situation of the mine or mining interests, or of the mining company in which such interests or shares are held, and the reasons why the sale is desired.

1887 R. S. Sec. 5500; amended 1899, 5th Ses. p. 377.

Section 4168. Order to Show Cause: Upon the presentation of such petition, the probate judge must make an order directing all persons interested to appear before him at a time and place specified, not less than three nor more than eight weeks from the time of making such order, or show cause why an order should not be granted to the executor or administrator to sell such mines, mining interests, shares, or stocks, as are set forth in the petition and belonging to the estate. A copy of the order to show cause must be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or published at least three successive weeks in such newspaper as the court shall spec-

ify. If all persons interested in the estate, signify, in writing their assent to such sale, the notice may be dispensed with.

1887 R. S. Sec. 5501; amended 1899, 5th Ses. p. 378.

Section 4169. Hearing and Order of Sale; If, upon hearing the petition it appears to the satisfaction of the probate judge that it is to the interest of such estate that such mining property or interests of the estate should be sold, or if it appears to his satisfaction that an immediate sale is necessary in order to secure the just rights or interests of the mining partner, or tenants in common, such probate judge must make an order authorizing such administrator or other legal representative to sell such mines, mining interests or shares, and for that purpose, when necessary, to enter into written bonds or contracts with parties for the future sale upon such conditions and at such price as may be considered best, subject to the approval of said judge.

1887 R. S. Sec. 5502; amended 1899, 5th Ses. p. 378.

Section 4170. Sale or Bonding, Disposition of Proceeds: If the order is made for the sale of the property, such sale must be made and such proceedings had as are provided for in the sale of other real estate and property, but, if it be for the bonding or contracting for the sale thereof, the administrator or legal representative must be authorized to enter into a bond or contract for the sale, and, when necessary, to make and fully execute and place in escrow at some place approved by such judge, a proper deed of conveyance for the property. In any case the proceeds of the sale of the property shall be disposed of as other proceeds and assets of the estate; *Provided*, That when the decedent was not a citizen of this State, if no claims are established in the probate court in this State against the estate, such proceeds, in the absence of any proper objections by parties interested in such estate, must, upon the order of the probate court, be paid to the proper foreign administrator or representative or heir of the estate, or to parties entitled thereto as may be determined by the court, less the cost of the proceedings in the probate court in this State.

1887 R. S. Sec. 5503; amended 1899, 5th Ses. p. 378.

SALE OF REAL ESTATE, WHEN SUBJECTED, PETITION, NOTICE, HEARING AND ORDER.

Section 4171. To Sell Real Estate, when: When the personal estate in the hands of the executor or administrator is exhausted or insufficient to pay the allowance of the family, the debts outstanding against the decedent, and the debts, expenses, and charges of administration, the executor or administrator may sell the real estate for that purpose, upon the order of the probate court.

1887 R. S. Sec. 5504.

An administrator's agreement to sell real estate for a certain sum or to procure an order of court to sell the same,

while not binding on the estate is not void as against public policy.—*Stuart v. Allen*, 16 Cal. 473, 76 Am. Dec. 551.

Section 4172. Petition for Sale, what to Contain: To obtain such order he must present a verified petition to the pro-

bate court, or to the judge at chambers, setting forth the amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will be or may accrue during the administration; a description of all the real estate of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value of the respective portions and lots thereof, and whether the same be community or separate property; the names and ages of the devisees, if any, and of the heirs of the decedent. If all the matters above enumerated cannot be ascertained it must be so stated in the petition.

1887 R. S. Sec. 5505.

PETITION, NECESSARY TO GIVE JURISDICTION: An order for the sale of real estate, under the provisions of the statute above cited, is not one made in a pre-existing proceeding, in which the court has already acquired jurisdiction, but it is in reality a judgment in a new, separate, and independent proceeding, depending for its validity upon the sufficiency of the facts contained in the petition. It is absolutely necessary, to the jurisdiction of the court making the order or judgment of sale, that there should be a petition, sufficient in substance, to show legal grounds for the order; and an order of sale, without any petition therefor, would be void.—*Ethell v. Nichols*, 1 Idaho, 741.

Petition by executor for sale of real amount of the personal property of the estate of decedent must set forth amount of the personal property of the

estate, which has come into his hands, otherwise an order of sale made by the probate court and the sale made thereunder are void. The mere fact that an account of such personal estate is filed, at or about the same date of filing the petition, or is found among the papers of the probate proceedings, is not sufficient, unless such account is referred to in the petition so as to form a part of it for the purpose of reference.—*Gregory v. Taber*, 19 Cal. 397, 79 Am. Dec. 219 and note; *Stuart v. Allen*, 16 Cal. 473, 76 Am. Dec. 551 and note.

Administrator who is also guardian of infant heir, and who, as administrator, attempts to divest the title of the heir by a sale of the decedent's land for the payment of debts, occupies quoad the petition a position hostile to the heir, and a guardian ad litem must be appointed.—*Townsend v. Tallant*, 33 Cal. 5, 91 Am. Dec. 617 and note.

Section 4173. Order to Persons Interested to Appear:

If it appears to the court of judge, from such petition, that it is necessary to sell the whole or some portion of the real estate for the purposes and reasons mentioned in the preceding Section, or any of them, such petition must be filed and an order thereupon made, directing all persons interested in the estate to appear before the court at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary.

1887 R. S. Sec. 5506.

Section 4174. Copy Served, Assent Given, or Publication:

A copy of the order to show cause must be personally served on all persons interested in the estate, and on any general guardian of any minor, or devisee, or heir of the decedent resident in the county, at least five days before the time appointed for hear-

ing the petition, or must be published at least four successive weeks in such newspaper as the court or judge shall direct.

The notice is served if the publication is completed five days before the day set for hearing. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with.

1887 R. S. Sec. 5507.

Petition to sell real estate of intestate is a substitute for the action against the heir. The heir must be cited and allowed to be heard, and it is not concluded by proceedings to which he is not a party and may dispute the validity of claims upon which a petition for the sale of real estate of a decedent is based although such claims may have been allowed by the administrator and the probate judge. A creditor of the estate of the intestate, may, upon issue

joined, have the truth of his claim tried by the probate judge.—Beckett v. Sclover, 7 Cal. 215, 68 Am. Dec. 237.

Order to show cause why land of decedent should not be sold to pay debts, and a sale made under proceedings based on the order, are void, where the interval between the date of the order and the day fixed for the hearing of the petition for sale is less than the time required by law for the publication of the notice.—Townsend v. Tallant, 33 Cal. 45, 91 Am. Dec. 617.

Section 4175. Hearing After Proof of Service: The probate court, at the time and place appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service or publication of a copy of the order, by affidavit or otherwise, if the consent in writing to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate who may oppose the application.

1887 R. S. Sec. 5508.

Section 4176. Administrator, etc., may be Examined: The executor, administrator, and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the probate judge, in the same manner and with like effect as in other cases.

1887 R. S. Sec. 5509.

Section 4177. To Sell Real Estate, when: If it appears necessary to sell a part of the real estate, and that by a sale thereof the residue of the estate, real or personal, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after any such sale the residue would be so small in quantity or value, or would be of such a character with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interests of all concerned that the same should be sold, the court may authorize the sale of the whole estate or of any part thereof, necessary and for the best interest of all concerned.

1887 R. S. Sec. 5510.

Section 4178. Order of Sale, when to be made: If the court is satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested that a sale of the whole or some portion of the real estate is necessary for any of the causes mentioned in this Chapter, or if such sale be

assented to by all the persons interested, an order must be made to sell the whole, or as much and such parts of the real estate described in the petition as the court shall judge necessary or beneficial.

1887 R. S. Sec. 5511.

Section 4179. What Order must Contain. Public or Private Sale: The order of the sale must describe the lands to be sold and the terms of sale, which may be for cash or on credit not exceeding one year, payable in gross or in installments, and such kind of money, with interest, as the court may direct. The land may be sold in one parcel or in subdivisions as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs.

If it appears that any part of such real estate has been devised and not charged in such devise with the payment of debts or legacies, the court must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale; the court may, if the same is asked for in the petition, order or direct such real estate or any part thereof, to be sold at either public or private sale as the executor or administrator shall judge to be most beneficial for the estate.

If the executor or administrator neglects or refuses to make a sale under the order and as directed therein, he may be compelled to sell by order of the court, made on motion after due notice, by any party interested.

1887 R. S. Sec. 5512.

Section 4180. Interested Persons may Apply for Order: If the executor or administrator neglects to apply for an order of sale when it is necessary, any person interested in the estate may make application therefor, in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator before the hearing. The petition of such applicant must contain as many of the matters required in petitions of executors and administrators as he can ascertain, and the decree of sale must fix the period of time within which the executor or administrator must make the sale.

1887 R. S. Sec. 5513.

Section 4181. To Deliver Copy of Order to Executor: Upon making the order mentioned in the last Section, a certified copy of the order of sale must be delivered by the court or the clerk to the executor or administrator, who is thereupon authorized and required to sell the real estate as directed.

1887 R. S. Sec. 5514.

CONDUCT OF SALE.

Section 4182. Notice of Sale: When a sale is ordered, and is to be made at public auction, notice of the time and place of

sale must be posted in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court may direct, for three weeks successively next before the sale. The lands and tenements to be sold must be described with common certainty in the notice.

1887 R. S. Sec. 5515.

Section 4183. Time and Place: Sales at public auction must be made in the county where the land is situated; but when the land is situated in two or more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning on the day named in the notice of sale, unless the same is postponed

1887 R. S. Sec. 5516.

Section 4184. Private Sale, how Made; Bids, how Received: When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county—if none, then in such paper as the court may direct—for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the probate court, to which the return of sale must be made, at any time after the first publication of the notice, and before the making of the sale. If it is shown that it will be for the best interest of the estate, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight days from the first publication of the notice, in which case the notice of sale and the sale may be made to correspond with such order.

1887 R. S. Sec. 5517.

Section 4185. Ninety Per Cent. Appraised Value Must be Offered: No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real estate has been appraised, within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof.

1887 R. S. Sec. 5518.

Section 4186. Purchase Money on Sale on Credit, how Secured: The executor or administrator must, when the sale is made upon a credit, take the notes of the purchaser for the purchase money, with a mortgage on the property to secure their payment.

1887 R. S. Sec. 5519.

Section 4187. Sale may be Postponed: If at the time appointed for the sale, the executor or administrator deems it for the interest of all persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months.

1887 R. S. Sec. 5525.

Section 4188. Notice of Postponement: In case of a postponement, notice thereof must be given, by a public declaration, at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given, by posting notices in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit.

1887 R. S. Sec. 5526.

CONFIRMATION, HEARING.

Section 4189. Hearing and Setting Aside when Re-Sale Ordered: The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk at any time subsequent to the sale. A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently, and thereupon the court or judge must fix the day for the hearing, of which notice of at least ten days must be given by the clerk by notices posted in three public places in the county, or by publication in a newspaper or both, as the court or judge shall direct, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent, exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer of ten per cent more in amount than that named in the return be made to the court in writing by a responsible person it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale.

1887 R. S. Sec. 5520.

Section 4190. Objections, when, who may File: When return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof and may

be heard thereon when the return is heard by the court or judge, and may produce witnesses in support of his objections.

1887 R. S. Sec. 5521.

Section 4191. When Order of Confirmation Made:

If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid before mentioned be made and accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale, from that time, is confirmed and valid, and a certified copy of the order confirming it and directing conveyances to be executed must be recorded in the office of the recorder of the county within which the land sold is situated. If after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a re-sale to be made of the property. If the amount realized on such re-sale does not cover the bid and the expenses of previous sale, such purchaser is liable for the deficiency to the estate.

1887 R. S. Sec. 5522.

Order of sale of real estate, made by the probate court having acquired jurisdiction, cannot be attacked in a collateral proceeding on the ground that it was made upon insufficient evidence or contrary to the evidence, or because

the sale of a small portion of it would have been sufficient, or because the administrator procured it to be made to pay a debt which had previously been paid with funds of the estate.—*Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146.

Section 4192. Conveyances: Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the probate court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were, at large, inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent, in the premises, at the time of his death; if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises, other than, or in addition to, that of the decedent at the time of his death, such right, title, or interest also passes by such conveyances.

1887 R. S. Sec. 5523.

It is the official duty of the administrator, enjoined by statute, to execute a conveyance of real estate after return of sale has been made as required by law, and confirmed by the court, and to execute a conveyance therefor as directed by the order of confirmation. In case of refusal, mandamus will issue to compel him to act.—*People ex rel. Cnemung Mining Co. v. Cunningham* (Idaho), 53 Pac. 451.

Substitution of one name for another

on auctioneer's list of purchasers cannot affect the validity of the sale. The orders directing and confirming it give it validity.

Executor's deed contains no warranty, and only conveys the title of the deceased to the purchaser. In probate sales, caveat emptor is the rule, and it is no excuse for not paying the bid that the bidder finds the title defective.—*Halleck v. Guy*, 9 Cal. 181, 70 Am. Dec. 643.

Section 4193. Order of Confirmation, what to State:

Before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made.

1887 R. S. Sec. 5524.

Void administrator's sale may be attacked collaterally, notwithstanding its confirmation by the probate court.—*Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617.

If letters of administration purporting to be sealed are issued to a regularly appointed administratrix, who takes oath, gives bond, and claims to hold valid letters of administration, and is repeatedly recognized as administratrix

by the court in its orders reciting that she is such, a conveyance made by her as such administratrix after confirmation of a sale of land ordered by the court cannot be collaterally attacked by the heirs of the deceased on the ground that such letters of administration are void because they did not bear upon their face the impress of the seal of the court.—122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17 and note.

PROVISIONS OF WILL EFFECTING.

Section 4194. Payment of Debts Provided for by Will:

If the testator makes provisions by his will, or designates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they must be paid according to such provision or designation, out of the estate thus appropriated, so far as the same is sufficient.

1887 R. S. Sec. 5527.

Section 4195. Sales Without Order: When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case, no title passes unless the sale be confirmed by the court.

1887 R. S. Sec. 5528.

DEVISE TO TRUSTEE WITH POWER OF SALE: After the decree of distribution to the widow as trustee no confirmation of a sale under the power held by her as trustee is required or authorized by law.—*Morffew v. S. F. & S. R. R. Co.* 107 Cal. 587, 40 Pac. 810.

A sale of real estate of a testator by the executors under a power contained in the will passes no title unless confirmed by the court, except where the will devises the property in trust, and vests the legal title in the executors as trustees.—*Bennalack v. Richards*, 116 Cal. 407, 48 Pac. 622.

Section 4196. When Provision by Will Insufficient:

If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this Chapter.

1887 R. S. Sec. 5529.

Section 4197. Estate Subject to Debts: The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in pro-

portion to the value or amount of the several devisees or legacies, but specific devisees or legacies are exempt from liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate.

1887 R. S. Sec. 5530.

Section 4198. Contribution Among Legatees: When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the probate court, when distribution is made, made, must, by decree for that purpose, settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares respectively, for the purpose of paying such contribution.

1887 R. S. Sec. 5531.

EQUITY UNDER LAND CONTRACTS.

Section 4199. Contract for Purchase of Lands, Sold, how: If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such land and under such contracts may be sold on the application of his executor or administer in the same manner as if he had died seized of such land, and the same proceedings may be had for that purpose as are prescribed in this Chapter for the sale of lands of which he died seized, except as hereinafter provided.

1887 R. S. Sec. 5532.

Section 4200. Conditions of Sale: The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the probate judge until the purchasers execute a bond to the executor or administrator, for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the probate judge shall approve.

1887 R. S. Sec. 5533.

Section 4201. Purchaser to Give Bond: The bond must be conditioned that the purchaser will make all payments for such land that shall become due after the date of the sale, and will fully indemnify the executor or administrator, and the persons so entitled against all demands, costs, charges and expenses, by reason of any covenant or agreement contained in such contract.

1887 R. S. Sec. 5534.

Section 4202. Executor to Assign Contract: Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract which vests in the purchaser, his heirs and assigns, all the right, title and interest of the estate, or of the persons entitled to the interest of the decedent,

in the lands sold at the time of the sale, and the purchaser has the same rights and remedies against the vender of such land as the decedent would have had if he were living.

1887 R. S. Sec. 5535.

SALE OF MORTGAGED LANDS.

Section 4203. Sales of Land Subject to Mortgage:

When any sale is made by an executor or administrator, pursuant to the provisions of this Chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay; and the land is subject to such mortgage or lien until the purchase money has been actually so applied. No claim against any estate which has been presented and allowed is affected by the statute of limitations, pending the proceedings for settlement of the estate.

The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the probate court to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase money must be paid over by the clerk of the court without delay, in payment of the expenses of the sale, and a satisfaction of the debt, to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator unless for good cause shown, after notice to the executor or administrator, the court otherwise directs.

1887 R. S. Sec. 5536.

Section 4204. Holder of Mortgage Lien may Purchase Lands: At any sale under order of the probate court of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment protanta. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court or the clerk thereof, an amount sufficient to pay such expenses.

1887 R. S. Sec. 5537.

LIMITATION OF ACTION FOR VACATING.

Section 4205. Limitation of Actions for Vacating Sale: No action for the recovery of any estate sold by an executor or administrator under the provisions of this Chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the sale. An action to set aside the sale may be instituted and maintained at any

time within three years from the discovery of the fraud, or other grounds upon which the action is based.

1887 R. S. Sec. 5540.

Statute providing that "no action for the recovery of any real estate sold by an executor or administrator under the provisions of this chapter shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale" ap-

plies to all sales, void as well as voidable, made by the probate courts, of real estate belonging to persons who have died since the passage of the act.—*Harlan v. Peck*, 33 Cal. 515, 91 Am. Dec. 653.

Action to set aside sale.—See *Dennis v. Burt*, 122 Cal. 42, 54 Pac. 378.

Section 4206. Preceding Section not to Apply, when:

The preceding section shall not apply to minors or others under any legal disability, to sue at the time when right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability.

1887 R. S. Sec. 5541.

DUTIES AND LIABILITIES OF ADMINISTRATORS.

Section 4207. Administrator and Executor Liable for Misconduct: If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers damages, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise.

1887 R. S. Sec. 5538.

Section 4208. Fraudulent Sales: Any executor or administrator who fraudulently sells any real estate of a decedent contrary to or otherwise than under the provisions of this Chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate or inheritance therein.

1887 R. S. Sec. 5539.

Section 4209. Account of Sale to be Returned: When a sale has been made by an executor or administrator of any property of the estate, real and personal, he must return to the probate court, at its next term thereafter, an account of sales, verified by his affidavit. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue, or such revocation should not be made.

1887 R. S. Sec. 5542.

Section 4210. Executors, etc., not to be Purchasers: No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale.

1887 R. S. Sec. 5543.

Purchase, through another person, of land of intestate by administrator at his own sale, is not void, but only voidable at the election of the heirs or other persons interested in the estate, who

may have the sale set aside and the administrator declared a trustee.—*Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146.

Conveyance to administrator, as such, of land to which his intestate was entitled in his lifetime, is sufficient to vest

title in the administrator, and enable him to maintain suit as such, notwith-

standing his trust.—*Matter of Smith*, 4 Nev. 254, 97 Am. Dec. 531.

CHAPTER CXCI.

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS AND OF THE MANAGEMENT OF ESTATES.

Section.

4211. Executor to take possession of entire estate.

4212. Executors may sue and be sued.

4213. Liability of executor, etc., for costs.

4214. May maintain actions for waste.

4215. May be sued for waste, etc.

4216. Surviving partner to settle business and render account.

Section.

4217. Actions on bond of executor, etc.

4218. What executors are not parties to actions.

4219. May compound.

4220. Property fraudulently disposed of by testator.

4221. When executor to sue.

4222. Disposition of estate recovered.

4223. Funds pending settlement.

Section 4211. Executor to Take Possession of Entire Estate: The executor or administrator must take into possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purpose of administration, as provided in this Title.

1887 R. S. Sec. 5550.

Possession of estate: See Sec. 4113.

Subjecting property to administration where grantee holds under deed from

testator intended as a mortgage. Pleading, etc.—See *Bradbury v. Davenport*, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 92.

Section 4212. Executors may Sue and be Sued: Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates.

1887 R. S. Sec. 5551.

Effect of death or disability, substitution of personal representatives: Sec. 3174.

COLLATERAL ATTACKS: Where an administrator of a deceased person's estate brings an action upon a promissory note due the estate, the authority of such administrator cannot be attacked by the defendant on the grounds that his appointment was irregularly made. Such authority can be attacked only by direct proceeding by some one beneficially interested in the estate.—*Glendenning v. McNutt*, 1 Idaho, 592.

Administrator may maintain ejectment to recover possession of land, as the statute gives him a right of possession.—*Curtis v. Herrick*, 14 Cal. 117, 73 Am. Dec. 632.

An executor appointed in Texas may maintain an action in California in his own name upon judgment recovered by him as such executor in Texas.—*Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423.

The general rule is that no executor or administrator can either sue or be sued, in his official capacity, in the courts of any other country than that from which he derives his authority to act by virtue of letters there granted to him; but if foreign executors or administrators come within the jurisdictional limits of a state, they are liable to be sued there by creditors, or to be brought to an account by the legatees or distributees.—*McCully v. Cooper*, 114 Cal. 258, 46 Pac. 82, 55 Am. St. Rep. 66 and note.

Executor can be held to account as trustee, where he has come into possession of trust fund or its substitute, so that the same can be identified, and charged as such upon the same terms as his testator held the trust; and the relation of trustee and cestui que trust will be added to that of executor. But where testator during his lifetime min-

gled the money of the cestui que trust with his own, so that neither the trust money nor property into which it was converted could be identified in the hands of the executor, such claim must be presented to the executor for allowance as required by the probate act.—*Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141.

Section 4213. Liability of Executor, etc., for Costs:

When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceedings in which the costs were taxed was prosecuted or defended without just cause.

1887 R. S. Sec. 5479.

Costs in action by or against administrators chargeable only against the estate, except that the court may order

same to be paid by the administrator personally for mismanagement or bad faith: Sec. 3729.

Section 4214. May Maintain Actions for Waste:

Executors and administrators may maintain actions against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the goods of their testator or intestate, in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime.

1887 R. S. Sec. 5552.

Section 4215. May be Sued for Waste, etc.: Any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person.

1887 R. S. Sec. 5553.

Section 4216. Surviving Partner to Settle Business and Render Account:

When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the probate judge may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained.

1887 R. S. Sec. 5554.

Surviving partner must account and pay over to administrator of deceased

partner all the profits of the realty and personalty of the firm which rightfully belong to the estate, although he has

purchased the interest of the heirs, or the community interest of the surviving wife of the deceased partner; it is for

the probate court to distribute the estate to the parties entitled.—*Smith v. Walker*, 38 Cal. 385, 99 Am. Dec. 415.

Section 4217. Actions on Bond of Executor, etc.: An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate.

1887 R. S. Sec. 5555.

Section 4218. What Executors are not Parties to Action: In actions by or against executors, it is not necessary to join those as parties to whom letters were issued, but who have not qualified.

1887 R. S. Sec. 5556.

Section 4219. May Compound: Whenever a debtor of a decedent is unable to pay all his debts, the executor or administrator, with the approbation of the probate court or judge, may compound with him, and give him a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just, and for the best interest of the estate.

1887 R. S. Sec. 5557.

An executor has no power to compromise suit pending against estate of his

testator without the consent of the probate court.—*Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376.

Section 4220. Property Fraudulently Disposed of by Testator: When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditors all such real estate so fraudulently conveyed; and may also, for the benefit of the creditors, sue and recover all goods, chattels; rights or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

1887 R. S. Sec. 5558.

Executor or administrator may sue without joining beneficiaries: Sec. 3155.

Power to bring actions: Secs. 4113, 4211, 4214.

To set aside a sale made by a decedent, under the provisions of Section 5558, Rev. St. Idaho, it must be shown that such sale was made with intent to defraud creditors; and where the existence of such intent is disclaimed by

the plaintiff, the sale will not be disturbed.—*Brown v. Perrault* (Idaho), 51 Pac. 752.

Administrator of deceased husband cannot maintain any claim against his surviving wife in relation to property claimed by her as her separate property which the deceased husband could not have successfully asserted in his lifetime.—*Peck v. Brummagin*, 31 Cal. 440, 89 Am. Dec. 195.

Section 4221. When Executor to Sue: No executor or administrator is bound to sue for such estate as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the

suit or give such security to the executor or administrator therefor, as the probate judge shall direct.

1887 R. S. Sec. 5559.

A person whose claim against an estate has been disallowed by the administrator, and for the establishment of which, as a claim, an action is pend-

ing and undetermined, is not a creditor within the meaning of this section.--
Ohm v. Superior Court, 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245.

Section 4222. Disposition of Estate Recovered: All real estate so recovered must be sold for the payment of debts in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the probate court; and the proceeds of all goods, chattels, rights, and credits so recovered must be appropriated in payment of the debts of the decedent in the same manner as other property in the hands of the executor or administrator.

1887 R. S. Sec. 5560.

Section 4223. Funds Pending Settlement: Pending the settlement of any estate, on the petition of any party interested therein, and upon good cause shown therefor, the court may order any moneys in the hands of the executors or administrators to be invested for the benefit of the estate in securities of the United States or of this state. Such order can only be made after publication of notice of the petition in some newspaper to be designated by the court or judge thereof.

1887 R. S. Sec. 5605.

CHAPTER CXIII.

CONVEYANCE OF REALTY TO COMPLETE DECEDENT'S CONTRACT.

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4232. Recording decree, etc.

4233. Conveyance where party entitled to is dead.

4234. Decree may direct surrender of possession.

Section 4224. Completion of Contracts for Sale of Real Estate: When a person who is bound by contract in writing to convey any real estate, dies before making the conveyance, where such decedent, if living, might be compelled to make such conveyance, the probate court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.

1887 R. S. Sec. 5565.

Section 4225. Petition for Executor to Make Conveyance: On the presentation of a verified petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predi-

cated, the probate court must appoint a time and place for hearing the petition, at a regular term of the court, and must order notice thereof to be published at least four successive weeks before such hearing, in such newspaper in this state as he may designate.

1887 R. S. Sec. 5566.

Petition: Sec. 4159.

Verification: Sec. 2219.

Publication of notice: Sec. 4305.

Section 4226. Interested Parties, may Contest: At the time and place appointed for the hearing, or at such other time to which the same may be postponed upon satisfactory proof, by affidavit or otherwise, of the due publication of the notice, the court must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court may examine on oath, the petitioner and all who may be produced before him for that purpose.

1887 R. S. Sec. 5567.

Section 4227. Conveyances, when Ordered: If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made, entered on the minutes of the court, and recorded.

1887 R. S. Sec. 5568.

Section 4228. Execution of Conveyance, etc., how Enforced: The executor or administrator must execute the conveyance according to the directions of the decree, a certified copy of which must be recorded with the deed in the office of the recorder of the county where the land lies, and is prima facie evidence of the correctness of the proceeding, and of the authority of the executor or administrator to make the conveyance.

1887 R. S. Sec. 5569.

Section 4229. Rights of Petitioner to Enforce Contract: If, upon hearing in the probate court, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the rights of the petitioner, who may, at any time within six months thereafter, proceed, in the district court, to enforce a specific performance thereof.

1887 R. S. Sec. 5570.

Section 4230. Effect of Conveyances: Every conveyance made in pursuance of a decree of the probate court, as provided in this chapter, shall pass the title to the estate contracted for as fully as if the contracting party himself was still living and executed the conveyance.

1887 R. S. Sec. 5571.

Section 4231. Effect of Recording Copy of Decree: A copy of the decree for a conveyance made by the probate court,

and duly certified and recorded in the office of the recorder of the county where the lands lie, gives the person entitled to the conveyance a right to the possession of the lands contracted for, and to hold the same according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the decree.

1887 R. S. Sec. 5572.

Section 4232. Recording Decree, etc.: The recording of any decree, as provided in the preceding section, shall not prevent the court making the decree from enforcing the same by other process.

1887 R. S. Sec. 5573.

Section 4233. Conveyance where Party Entitled to is Dead: If the person entitled to the conveyance dies before the commencement of the proceedings therefor under this chapter, or before the completion of the conveyance, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent may for the benefit of the person so entitled, commence such proceedings, or prosecute any already commenced, and the conveyance must be so made as to vest the estate in the person entitled to it, or in the executor or administrator, for their benefit.

1887 R. S. Sec. 5574.

Section 4234. Decree may Direct Surrender of Possession: The decree provided for in this Chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto, upon his producing the deed and a certified copy of the decree, when by the terms of the contract, possession is to be surrendered.

1887 R. S. Sec. 5575.

CHAPTER CXCV.

ACCOUNTS RENDERED BY EXECUTORS AND ADMINISTRATORS, AND OF THE PAYMENT OF DEBTS.

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4267. Order for payment of legacies.

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4269. Neglect to render final account.

LIABILITY.

Section 4235. When Executor or Administrator Personally Liable: No executor or administrator is chargeable upon any special promise to answer damages or to pay the debts of the testator of intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

1887 R. S. Sec. 5580.

An administrator is personally liable for money borrowed by him in his representative capacity without an order of court, and used in the payment of the debts of the estate generally, other than

existing debts created by the deceased, or for administration expenses, or for the actual preservation of the estate.—*First Nat. Bank v. Collins*, 17 Mont. 433, 43 Pac. 499, 52 Am. St. Rep. 695.

Section 4236. Executor Charged with all Estate: Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit, and income of the estate.

1887 R. S. Sec. 5581.

Section 4237. Not to Profit or Lose by Estate: He shall not make profit by the increase, nor suffer loss by the decrease, or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made.

1887 R. S. Sec. 5582.

Where charges in favor of an administrator in his annual account have been rejected, by reason of his failure to present the necessary vouchers required by statute, he may include the

charges in a subsequent account, and have them allowed on production of the vouchers.—*Walls v. Walker*, 37 Cal. 424, 99 Am. Dec. 290. As to administrator's accounts generally, see note 99 Am. Dec. 296-299.

Section 4238. Uncollected Debts Without Fault: No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault.

1887 R. S. Sec. 5583.

Section 4239. Not to Purchase Claims Against Estate: No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for any less

than its nominal value he is only entitled to charge in his account the amount he actually paid.

1887 R. S. Sec. 5585.

COMPENSATION.

Section 4240. Compensation of Executor, etc: He shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as provided in this chapter; but when the decedent by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument, filed in the probate court, he renounce all claim for compensation provided by the will.

1887 R. S. Sec. 5584.

Probate court has exclusive jurisdiction to adjust and enforce demands for expenses of administration of the estates of decedents, among which are claims for services rendered and money expended, at the request of the administrator, for the benefit of the estate; and an action is not maintainable in the district court, against the administrator, which seeks to charge the estate with such expenses.—*Gurnee v. Maloney*, 38 Cal. 85, 99 Am. Dec. 352 and note.

Executor may employ counsel to de-

fend interests of the estate when it is involved in litigation. But he has no right to employ counsel at the expense of the estate to do what he himself should do, and for the doing of which he is compensated by his commissions.

Executor having mining stock liable to assessment should obtain order of court to sell it, or if the estate be surely solvent, turn it over to the legatees; but he has no power to borrow money to pay the assessments.—*Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376 and note as to power of administrator to bind estate for attorney's fees.

Section 4241. Executor's and Administrator's Commissions: When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of the estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent; for all above that sum and not exceeding ten thousand dollars, at the rate of five per cent; for all above that sum, at the rate of four per cent; and the same commission must be allowed administrators. In all cases, such further allowance may be made as the probate judge may deem just and reasonable, for any extraordinary service. The total amount of such allowance must not exceed the amount of commissions allowed by this section.

1887 R. S. Sec. 5586.

RENDITION OF ACCOUNT.

Section 4242. To Render an Exhibit of Receipts, etc: At the third term of the court after his appointment, and thereafter at any time when required by the court, either upon its own motion or upon the application of any person interested in the estate, the executor or administrator must render, for the information of the court, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate and the names of the claimants, and all other matters necessary to show the condition of its affairs.

1887 R. S. Sec. 5587.

The measure of an executor's liability for stocks, which he has permitted to be sold without an order of court, is not limited to their appraised nor to their actual value, but extends to the

amount for which they were sold, where that exceeds the appraised or actual value.—Estate of Radovich, 74 Cal. 536, 16 Pac. 321, 5 Am. St. Rep. 466.

Section 4243. Citation to Account at third Term:

If the executor or administrator fails to render an exhibit at the third term of the court, the judge of the probate court must cause a citation to be issued requiring him to appear and render it.

1887 R. S. Sec. 5588.

Section 4244. Petition for Citation: Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the probate judge, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made.

1887 R. S. Sec. 5589.

Section 4245. Citation to Account on Application:

If the judge is satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must direct a citation to be issued to the executor or administrator, requiring him to appear at some day to be named in the citation, which must be during a term of the court, and render an exhibit as prayed for.

1887 R. S. Sec. 5590.

Section 4246. Objections to Account, who may File:

When an exhibit is rendered by an executor or administrator, any person interested may appear and, by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate, his letters must be revoked.

1887 R. S. Sec. 5591.

Section 4247. Attachment for not Obeying Citation:

If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him and such exhibit enforced, or his letters may be revoked, in the discretion of the court.

1887 R. S. Sec. 5592.

Section 4248. Render Accounts at Expiration of Term: Within thirty days after the expiration of the time mentioned in the notice to creditors within which claims must be exhibited, every executor or administrator must render a full account and report of his administration. If he fails to present his account, the court or judge must compel the rendering of the account by attachment, and any person interested in the estate may apply for and obtain an attachment; but no attachment must issue unless a citation has been first issued, served, and returned, requiring the executor or

administrator to appear and show cause why an attachment should not issue. Every account must exhibit all debts which have been presented and allowed during the period embraced in the account.

1887 R. S. Sec. 5593.

Section 4249. Executor to Account After His Authority Revoked: When the authority of an executor or administrator ceases or is revoked for any reason, he may be cited to account before the probate court at the instance of the person succeeding to the administration of the same estate in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator.

1887 R. S. Sec. 5594.

An executor who has resigned his trust, settled his accounts and received his discharge, may, nevertheless, be cited before the court by his successor,

and required to account for property converted by him and not included in his former accounts.—*Estate of Rado- vich*, 74 Cal. 523, 16 Pac. 315, 5 Am. St. Rep. 464 and note.

Section 4250. Neglect, Revoking Authority of Executor: If the executor or administrator resides out of the county, or absconds, or conceals himself, so that the citation cannot be personally served, and neglects to render an account within thirty days after the time above prescribed, or if he neglects to render an account within thirty days after being committed where the attachment has been executed, his letters must be revoked.

1887 R. S. Sec. 5595.

Section 4251. To Produce and File Vouchers: In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims, and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness.

1887 R. S. Sec. 5596.

Section 4252. Vouchers for Items, less than Twenty Dollars: On the settlement of his account he may be allowed any item of expenditure, not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but such allowances in the whole must not exceed five hundred dollars against any one estate.

1887 R. S. Sec. 5597.

Settlement of account in probate proceedings is only res judicata as to those matters actually embraced in the ac-

count; and where a mistake appears in a former settlement, it may be corrected in a subsequent one.—*Lucich v. Me- din*, 3 Nev. 93, 93 Am. Dec. 376.

SETTLEMENT, HEARING.

Section 4253. Day of Settlements, Notice: When any account is rendered for settlement, the court or judge must appoint

a day for the settlement thereof; the clerk must thereupon give notice thereof, by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account, which must be on some day of a term of the court. The court or probate judge may order such further notice to be given as may be proper.

1887 R. S. Sec. 5598.

Though under Sections 4253, 4255 and 4256, a person wishing to contest an administrator's account must file exceptions thereto, the court should, though

no exceptions are filed, examine and be satisfied as to the correctness of the account before settling it.—*In re Moore's Estate*, 121 Cal. 639, 54 Pac. 148.

Section 4254. Final Settlement and Distribution:

If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of the settlement must state those facts, which notice must be given by posting or publication, as the court may direct, and for such time as may be ordered. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings.

1887 R. S. Sec. 5599.

Section 4255. Interested Party may File Exceptions

On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account and contest the same.

1887 R. S. Sec. 5600.

Section 4256. Heirs may Contest all Matters. Hearing: All matters including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs for cause shown. The hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court may appoint one or more referees to examine the accounts and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent.

1887 R. S. Sec. 5601.

Section 4257. Settlement of Accounts to be Conclusive: The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their rights to proceed against the executor or administrator, either individually or upon his bond, within two years after their respective disabilities cease; and in any action brought by any such person, the allowance and settlement of the account is prima facie evidence of its correctness.

1887 R. S. Sec. 5602.

CONCLUSIVENESS: An order settling an executor's account after due notice, is conclusive as to items therein allowed, unless appealed from or set aside or modified.—*In re Marshall's Estate*, 118 Cal. 381, 50 Pac. 540.

Section 4258. Proof of Notice of Settlement: The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact.

1887 R. S. Sec. 5603.

PAYMENT OF DEBTS, ORDER OF PREFERENCE.

Section 4259. Order in Which Debts to be Paid: The debts of the estate must be paid in the following order:

1. Funeral expenses;
2. The expenses of the last sickness.
3. Debts having preference by the laws of the United States;
4. Judgments rendered against the decedent in his lifetime, and mortgages in the order of their date;
5. All other demands against the estate.

1887 R. S. Sec. 5606.

Claims of employes, wages preference, rank and priority of: Sec. 3362.
Funeral expenses of a decedent in-

clude a tombstone erected over his grave.—*Van Emon v. Superior Court*, 76 Cal. 589, 18 Pac. 877, 9 Am. St. Rep. 258.

Section 4260. When Property Insufficient to Pay Mortgage: The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property is insufficient to pay the mortgage, the part remaining unsatisfied must be classed with the other demands against the estate.

1887 R. S. Sec. 5607.

Section 4261. Estate Insufficient, Dividend Paid: If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid.

1887 R. S. Sec. 5608.

Section 4262. Funeral Expenses; Last Sickness; Family Allowance: The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and the expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of the administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this chapter, the payment has been ordered by the court.

1887 R. S. Sec. 5609.

Section 4263. Order for Payment of Debt; Discharge of Executor: Upon the settlement of the accounts of the executor or administrator, as required in this chapter, the court must make an order for the payment of the debts, as the circumstances of

the estate require. If there is not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the sum to be paid to each creditor. If the whole property or the estate be exhausted by such payment or distribution, such account may be considered as a final account, and the executor or administrator is entitled to discharge, on producing and filing the necessary vouchers and proofs showing that such payments have been made, and that he has fully complied with the decree of the court.

1887 R. S. Sec. 5610.

Section 4264. Provision for Disputed and Contingent Claims: If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a reduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered.

1887 R. S. Sec. 5611.

Section 4265. Payment Decreed. Executor Personally Liable to Creditors: When a decree is made by the probate court for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the district court, in favor of each creditor and the same proceeding may be had under such execution as if it had been issued from the district court. The executor or administrator is liable therefor on his bond, to each creditor.

1887 R. S. Sec. 5612.

Section 4266. Claims not Included in Order: When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees to contribute to the payment of his claim, but if the executor or administrator has failed to give the notice to the creditors, as prescribed by this title, such creditor may recover on the bond of the executor or administrator, the amount of his claim, or such part thereof as he would have been entitled to had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent and did not become absolute ten months before such day.

1887 R. S. Sec. 5613.

FINAL SETTLEMENT, WHEN DIRECTED.

Section 4267. Order for Payment of Legacies: If the whole of the debts have been paid by the first distribution, the court must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled, as provided in the next chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to be closed, the court must give such extension of time as may be reasonable for a final settlement of the estate.

1887 R. S. Sec. 5614.

Section 4268. Final Account, When to be Made: At the time designated in the last section, or sooner, if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account and pray a settlement of his administration.

1887 R. S. Sec. 5615.

Section 4269. Neglect to Render Final Account: If he neglects to render his account, the same proceedings may be had as prescribed in this chapter in regard to the first account to be rendered by him; and all the provisions of this chapter relative to the last mentioned account, and the notice and settlement thereof, apply to his account presented for final settlement.

1887 R. S. Sec. 5616.

CHAPTER CXCv.

PARTITION, DISTRIBUTION AND FINAL SETTLEMENT
OF ESTATES.

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DISTRIBUTION UPON GIVING BOND.

Section 4270. Payment of Legacies Upon Giving Bonds: At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, or legatee may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate.

1887 R. S. Sec. 5621.

Section 4271. Notice of Application for Legacies: Notice of the application must be given to the executor or administrator personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator.

1887 R. S. Sec. 5622.

Section 4272. Executor, etc., may Resist Application: The executor or administrator or any person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee, and make a similar application for himself.

1887 R. S. Sec. 5623.

Jurisdiction of probate court over the sale of real estate of deceased person does not come from its general jurisdiction over the administration of the estate, but from the petition for the sale

and the petition must comply with the provisions of the statute. A substantial compliance therewith is sufficient. —Richardson v. Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101.

Section 4273. Decree to Require Bond. Partition Made when Necessary. Costs: If at the hearing it appears that the estate is but little indebted and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, legatee, or devisee obtaining such order before receiving his share or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the probate judge, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or proportion of the estate to which he is entitled;

2. The executor or administrator to deliver to the heir, legatee or devisee the whole portion of the estate to which he may be entitled, or only a part thereof, designating it. If in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings shall be paid by the applicant, or if there be more than one, to be apportioned equally amongst them.

1887 R. S. Sec. 5624.

For instances of bequests held void for uncertainty and indefiniteness.—See *In re Traylor*, 81 Cal. 9, 22 Pac. 297, 15 Am. St. Rep. 17 and cases cited in note.

After more than one year has elapsed from the issuance of letters testamentary, and all allowed claims against the

estate have been paid, the court may order a partial distribution of the estate to the devisees and legatees, without requiring them to give bonds, if it reserves from distribution sufficient other property to pay all contested claims.—*In re Croker*, 105 Cal. 368, 38 Pac. 954.

Section 4274. Order for Payment of Bond: When any bond has been executed and delivered under the provisions of the preceding Section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court for an order requiring the payment and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money is not paid within the the time allowed, an action may be maintained by the executor or administrator on the bond.

1887 R. S. Sec. 5625.

DISTRIBUTION AFTER FINAL SETTLEMENT.

Section 4275. Distribution, how Made and to whom:

Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee or devisee the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child and the issue of other children, and any of them, before the close of administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance, must, without administration, be distributed to the other heirs at law. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution, and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court and included in the order or decree; or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts,

1887 R. S. Sec. 5626.

Petition by an administrator for the final distribution of the estate of the decedent can not properly contain averments for the purpose of charging a distributee with, and compelling him to

account for, property of the deceased, especially for property which came into his possession in another state.—*Estate of Cook*, 77 Cal. 220, 17 Pac. 923 and 19 Pac. 431, 11 Am. St. Rep. 267.

Section 4276. What the Decree Must Contain: In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand and sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal.

1887 R. S. Sec. 5627.

Decree of distribution when will annulled: Sec. 4017.

After decree of distribution, money of distributee in hands of administrator may be garnished by a creditor of the distributee, or may be reached by proceedings supplementary to execution.—*Estate of Nerac*, 35 Cal. 392, 95 Am. Dec. 111.

JUDGMENT SATISFIED CAN NOT BE REVIEWED ON APPEAL: Hence if persons to whom an estate was distributed by a decree of court have received and receipted for their full share so distributed to them, they can not appeal from such decree, and any appeal which they may attempt to prosecute may be dismissed upon motion.—*In re Baby*, 87 Cal. 200, 25 Pac. 405, 22 Am. St. Rep. 239.

Relief from an erroneous order of a court distributing an estate of a decedent must be sought by an appeal, and can not be obtained by a bill in equity, to restrain compliance therewith.—*Daly v. Pennie*, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61.

The final decree of distribution is conclusive of the rights of all persons.—*Cunha v. Hughes*, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27.

In the distribution of an estate, persons claiming adversely to the decedent can not present their claims and have property in the hands of an administrator turned over to them, on the ground that it belonged to them and not to decedent.—*Estate of Rowland*, 74 Cal. 523, 16 Pac. 315, 5 Am. St. Rep. 464.

Section 4277. Distribution when Decedent was not a Resident: Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a non-resident of this State, leaving a will which has been duly proved or allowed in the State of his residence, and an authenticated copy thereof, has been admitted to probate in this State, and it is necessary, in order that the estate or any part thereof may be distributed according to the will, that the estate in this State should be delivered to the executor or administrator in the State or place of his residence, the court may order such delivery to be made, and if necessary, order a sale of the real estate, and a like deliverery of the proceeds. The deliverery, in accordance with the order of the court, is a full discharge of the executor or administrator with the will annexed, in this State, in relation to all property embraced in such order which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate ordered by virtue of this Section, must be made in the same manner as other sales of real estate of decedents by order of the probate court.

1887 R. S. Sec. 5628.

Section 4278. Decree to be made After Notice: The order or decree may be made on the petition of the executor or ad-

ministrator, or of any person interested in the estate. Notice of the application must be given by posting or publication, as the court may direct, and for such time as may be ordered. If partition be applied for as provided in this Chapter, the decree of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed.

1887 R. S. Sec. 5629.

An attorney for the administrator of the estate of a deceased person is not disqualified to act for one who claims to be entitled to a distributive share of the estate of the decedent, if such

administrator does not claim to be an heir or otherwise entitled to any part of the estate.—*Jones v. Lamont*, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251.

Section 4279. No Distribution Ordered till Taxes Paid: Before any decree of distribution of an estate is made, the probate court must be satisfied, by the oath of the executor or administrator, or otherwise, that all State, county and municipal taxes, legally levied upon personal property of the estate, have been fully paid.

1887 R. S. Sec. 5630.

Section 4280. Advancement made to Heirs: All questions as to advancements made, or alleged to have been made, by the decedent, to his heirs, may be heard and determined by the probate court, and must be specified in the decree assigning and distributing the estate; and the final judgment, or decree of the probate court, or, in case of appeal, of the district or supreme court, is binding on all parties interested in the estate.

1887 R. S. Sec. 5642.

Under a statute declaring that partition of the estate of a decedent may be ordered on the petition of any person interested therein, and such petition may be filed and notice given at any time before the entry of the decree

of distribution, a petition filed after the entry of such decree can not give the court jurisdiction to proceed to make partition.—*Buckley v. Superior Court*, 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135 and note 140-151.

Section 4281. Disposition of Life Estate on Owner's Death: If any person has died, or shall hereafter die, who at the time of his death was the owner of a life estate which terminates by reason of the death of such person, any person interested in the property, or in the title thereto, in which such life estate was held, may file in the probate court of the county in which the property is situated his verified petition, setting forth such facts, and thereupon, and after such notice, by publication or otherwise, as the court may order, the court shall hear such petition and the evidence offered in support thereof, and if, upon such hearing, it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, the court shall make a decree to that effect, and thereupon a certified copy of such decree may be recorded in the office of the county recorder and thereafter shall have the same effect as a final decree of distribution so recorded.

1887 R. S. Sec. 5674.

PARTITION.

Section 4282. Estate in Common. Commissioners: When the estate, real or personal, assigned by the decree of distri-

bution to two or more heirs, devisees or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the probate court or judge, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the order or decree assigning and distributing the estate, must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority and is governed by the same rules as if three were appointed.

1887 R. S. Sec. 5631.

Section 4283. Partition and Notice, Time of Filing:

Such partition may be ordered and had in the probate court, on the petition of any person interested. But before commissioners are appointed or partition ordered by the probate court, as directed in this Chapter, notice thereof must be given to all persons interested, who reside in this State, or to their guardians, and to the agents, attorneys, or guardians, if any in this State, of such as reside out of the State, either personally or by public notice, as the probate court may direct. The petition may be filed, attorneys, guardians, and agents appointed, and notice given, at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made distributing the estate.

1887 R. S. Sec. 5632.

Section 4284. Estate in Different Counties, how Divided: If the real estate is in different counties, the probate court may, if deemed proper, appoint a commissioner for all, or different commissioners for each county. The estate in each county must be divided separately among the heirs, devisees, or legatees, as if there was no other estate to be divided, but the commissioner first appointed must, unless otherwise directed by the probate court, make division of such real estate, wherever situated within this State.

1887 R. S. Sec. 5633.

Section 4285. Partition and Distribution when Shares Assigned: Partition or distribution of the real estate may be made as provided in this Chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.

1887 R. S. Sec. 5634.

Section 4286. Shares Set out by Metes and Bounds: When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties

interested consent to have their shares set out so as to be held by them in common and undivided.

1887 R. S. Sec. 5635.

Section 4287. Whole Estate Assigned to One, in Certain Cases: When the real estate cannot be divided without prejudice or inconvenience to the owners, the probate court may assign the whole to one or more of the parties entitled to share therein who will accept it, always preferring the males to the females, and among children preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested, their just proportion of the true value thereof, or secure the same to their satisfaction, or, in case of the minority of such party, then to the satisfaction of his guardian, and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment as before provided, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete and the title to the whole of such real estate vests in the person to whom the same is so assigned.

1887 R. S. Sec. 5636.

Section 4288. Payments for Equality of Partition: When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

1887 R. S. Sec. 5637.

Section 4289. Estate may be Sold: When it appears to the court, from the commissioners' report, that it cannot otherwise be fairly divided, and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported, and confirmed in the same manner and under the same requirements provided in Chapter CXCI of this Title.

1887 R. S. Sec. 5638.

Section 4290. Notice to Persons Interested. Duties of Commissioners: Before any partition is made or any estate divided, as provided in this Chapter, notice must be given to all

persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place, when and where they shall proceed to make partition. The commissioners may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the matters before them.

1887 R. S. Sec. 5639.

Section 4291. To make Report; Recording Partitions: The commissioners must report their proceedings, and the partition agreed upon by them, to the probate court, in writing, and the court may, for sufficient reasons, set aside the report and commit the same to the same commissioners or appoint others; and when such report is finally confirmed, a certified copy of the judgment or decree of partition made thereon, attested by the clerk, under the seal of the court, must be recorded in the office of the recorder of the county where the lands lie.

1887 R. S. Sec. 5640.

Section 4292. When Commissioners not Necessary: When the probate court makes a judgment or decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is decreed, or some of them, request that such partition be made.

1887 R. S. Sec. 5641.

AGENTS FOR UNREPRESENTED NON-RESIDENTS.

Section 4293. Court may Appoint Agent for Absentees: When any estate is assigned or distributed by a judgment or decree of the court, as provided in this Chapter, to any person residing out of and having no agent in this State, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate as well as to act for such absent person in the distribution.

1887 R. S. Sec. 5643.

Section 4294. Agent to Give Bond. Compensation: The agent must first give a bond to the probate judge, to be approved by him, conditioned that he shall faithfully manage and account for the estate. The court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses.

1887 R. S. Sec. 5644.

Section 4295. Unclaimed Estate, how Disposed of: When personal property remains in the hands of the agent unclaimed for a year, and it appears to the court that it is for the benefit of those interested, it shall be sold under the order of the court; and the proceeds, after deducting the expenses of the sale allowed by the court, must be paid into the State treasury. When the payment

is made the agent must take from the treasury duplicate receipts, one of which must be filed in the office of the State auditor and the other in the probate court.

1887 R. S. Sec. 5645.

Section 4296. Absentees, when Property of, to be Sold: The agent must render to the probate court appointing him, annually, an account, showing:

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what;
2. The income derived therefrom;
3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid;
4. Expenses incurred in the care, protection and management thereof, and whether paid or unpaid. When filed, the probate court may examine witnesses and take proofs in regard to the account; and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court may, by order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase money to be deposited in the State treasury.

1887 R. S. Sec. 5646.

Section 4297. Liability of Agent: The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested.

1887 R. S. Sec. 5647.

Section 4298. Certificate to Claimant: When any person appears and claims the money paid into the treasury, the probate court making the distribution, must inquire into such claim, and being first satisfied of his right thereto, must grant him a certificate to that effect, under its seal; and upon the presentation of the certificate to him, the auditor must draw his warrant on the treasurer for the amount.

1887 R. S. Sec. 5648.

FINAL SETTLEMENT AND DISCHARGE.

Section 4299. Final Settlement, Decree, Discharge: When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court, all the property of the estate, to the parties entitled, and performed all the acts lawfully required of him, the court must make a judgment or decree discharging him from all liability to be incurred thereafter.

1887 R. S. Sec. 5649.

Section 4300. Discovery of Property: The final settlement of an estate does not prevent the subsequent issuance of letters

testamentary, or of administration with the will annexed, whenever other property of the estate is discovered, or whenever it becomes necessary or proper, from any cause, that letters should be again issued.

1887 R. S. Sec. 5650.

Section 4301. Settlement by Trustees after Distribution: Where any trust has been created by or under any will to continue after distribution, the probate court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust. And any trustee created by any will, or appointed to execute any trust created by any will, may from time to time, pending the execution of his trust, or may at the termination thereof render and pay for the settlement of his accounts as such trustee, before the probate court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators. The trustee, or in case of his death, his legal representatives, shall for that purpose present to the court his petition setting forth his accounts in detail; and upon the filing thereof the court or judge shall fix the day for the hearing, and a citation shall be issued citing all the beneficiaries of the said trust to appear and show cause why the account should not be allowed; such citation shall be served upon all the beneficiaries in the State, in the manner provided for by the service of citations to show cause why the final account of an executor or administrator should not be allowed and approved. And any such trustee may, in the discretion of the court, upon application of any beneficiary of the trust, be ordered to appear and render his account, after being cited by service of citation, as provided for the service of summons in civil cases. Upon the filing of the account so ordered, the same proceedings for the hearing and settlement thereof shall be had as are hereinbefore provided.

1901, 6th Ses. p. 31, Sec. 1.

Section 4302. Court to Fix Compensation: Unless compensation be provided for in the will the court shall allow the trustee or trustees the proper expenses and such compensation for services as the court may adjudge to be just and reasonable, and shall apportion such compensation among the trustees according to the services rendered by them respectively, and may, in its discretion, fix the yearly compensation for the trustee or trustees to continue as long as the court may judge proper.

1901, 6th Ses. p. 32, Sec. 2.

Section 4303. Appeal from Decree Settling Account: From a decree of the probate court settling such account, appeal may be taken to the district court in a manner provided for an appeal from a decree settling the account of an executor or administrator. The decree of the probate court, if affirmed on appeal, or becoming final without appeal, shall be conclusive.

1901, 6th Ses. p. 32, Sec. 3.

CHAPTER CXCVI.

ORDERS, DECREES, PROCESS, MINUTES, RECORDS, TRIALS AND APPEALS.

ORDERS AND DECREES, CITATION AND PUBLICATION.

Section.

- 4304. Orders and decrees to be entered.
- 4305. Publication to be made, how often.
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- 4307. Citation, how directed, what to contain.
- 4308. Citation, how issued.
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TRIAL AND APPEALS; PRACTICE AND PROCEDURE.

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- 4314. Rules of practice generally.
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- 4318. Court to try case when no jury demanded. Issues.
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- 4321. Costs, by whom paid in certain cases.
- 4322. Executor, etc., removed when committed for contempt.

ORDERS AND DECREES, CITATION AND PUBLICATION.

Section 4304. Orders and Decrees to be Entered: All orders and decrees made by the probate court during its terms, and all orders which the probate judge is specially authorized to make out of term time, or at chambers, must be entered at length in the minute book of the court. Upon the close of each term the judge must sign the minutes.

1887 R. S. Sec. 5655.

Section 4305. Publication to be Made, how Often: When any publication is ordered, such publication must be made daily or otherwise, as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this Title. The court or judge may, however, order a less number of publications during the period.

1887 R. S. Sec. 5656.

Section 4306. Recorded Decree to Impart Notice: When it is provided in this Title that any order or decree of a probate court or judge, or a copy thereof, must be recorded in the office of the county recorder, from the time of filing the same for record, notice is imparted to all persons of the contents thereof.

1887 R. S. Sec. 5657.

Section 4307. Citation, how Directed, what to Contain: Citations must be directed to the person to be cited, signed by the clerk, and issued under the seal of the court, and must contain:

1. The title of the proceeding;
2. A brief statement of the nature of the proceeding;
3. A direction that the person cited appear at a time and place specified.

1887 R. S. Sec. 5658.

Section 4308. Citation, how Issued: The citation may be issued by the clerk upon the application of any party, without an order of the judge, except in cases in which such order is by the provisions of this Title, expressly required.

1887 R. S. Sec. 5659.

Section 4309. Citation, how Served: The citation must be served in the same manner as a summons in a civil action.

1887 R. S. Sec. 5660.

Summons, how served: Sec. 3193 et seq.

Section 4310. Personal Notice Given by Citation: When personal notice is required, and no mode of giving it is prescribed in this Title, it must be given by citation.

1887 R. S. Sec. 5661.

Section 4311. When Citation to be Served: When no other time is specially prescribed in this Title, citations must be served at least five days before the return day thereof.

1887 R. S. Sec. 5662.

Section 4312. Description of Real Estate; One Publication Sufficient: When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale, or notice of a petition for the confirmation thereof. It is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court.

1887 R. S. Sec. 5663.

Section 4313. Service of Process on Guardian: Whenever an infant, insane, or incompetent person, has a guardian of his estate residing in this State, personal service upon the guardian of any process, notice or order of the court concerning the estate of a deceased person, in which the ward is interested, is equivalent to the service upon the ward, and is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward and waive any process, notice or order to show cause, which an adult or a person of unsound mind might do.

1887 R. S. Sec. 5673.

TRIAL AND APPEALS; PRACTICE AND PROCEDURE.

Section 4314. Rules of Practice Generally: Except as otherwise provided in this Title, the provisions of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this Title.

1887 R. S. Sec. 5664.

Section 4315. New Trials and Appeals: The provisions of this Code, relative to new trials and appeals—except in so

far as they are inconsistent with the provisions of this Title—apply to the proceedings mentioned in this Title.

1887 R. S. Sec. 5665.

matters: Chap. CXCIX, Secs. 4399-4401.

Section 4316. Time of Appeal to be Taken: The appeal must be taken within sixty days after the order, decree, or judgment is entered.

1887 R. S. Sec. 5666.

Section 4317. Issues in Probate Court, how Tried. Judgment: All issues of fact joined in the probate court must be tried in conformity with the requirements of Chapter CLXXXVI of this Title, in cases of contests of wills, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgment therein on the issues joined, as well as for costs, may be entered and enforced by execution or otherwise, by the probate court, as in civil actions.

1887 R. S. Sec. 5667.

Section 4318. Court to Try Case when no Jury Demanded. Issues: If no jury is demanded, the court must try the issues joined. If, on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either may move for a new trial upon the same grounds and errors, and in like manner, as provided in this Code for civil actions.

1887 R. S. Sec. 5668.

Section 4319. Attorney for Minor, Absent Heirs, etc., Compensation: At or before the hearing of petitions and contests for the probate of wills, for letters testamentary or of administration; for sales of real estate, and confirmations thereof; settlements, partition, and distribution of estates, setting apart homesteads, and all other proceedings where all the parties interested in the estate are required to be notified thereof, the court may, in its discretion, appoint some competent attorney at law to represent in all such proceedings, the devisees, legatees, heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are non-residents of the State; and those interested who, though they are neither such minors nor non-residents, are unrepresented. The order must specify the names of the parties, so far as known, for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee, to be fixed by the court, for his services, which must be paid out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney. If for any cause, it becomes necessary, the court may substitute an-

other attorney for the one first appointed, in which case the fee must be proportionately divided. The non-appointment of an attorney will not affect the validity of any of the proceedings.

1887 R. S. Sec. 5669.

Section 4320. Decree Relative to Homestead; Effect Thereof: When a judgment or decree is made, setting apart a homestead, confirming a sale, making distribution of real estate, or determining any other matter, affecting the title to real estate, a certified copy of the same must be recorded in the office of the recorder of the county in which the land is situated.

1887 R. S. Sec. 5670.

Section 4321. Costs, by Whom Paid in Certain Cases: When it is not otherwise prescribed in this Title, the probate court, or the district or supreme court, on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution for the costs may issue out of the probate court.

1887 R. S. Sec. 5671.

Section 4322. Executor, etc., Removed When Committed for Contempt: Whenever an executor, administrator, or guardian is committed for contempt, in disobeying any lawful order of the probate court or the judge thereof, and has remained in custody for thirty days without obeying such order or purging himself otherwise of the contempt, the probate court may, by order reciting the facts, and without further showing or notice, revoke his letters and appoint some other person entitled thereto, executor, administrator, or guardian in his stead.

1887 R. S. Sec. 5672.

CHAPTER CXC VII.

PUBLIC ADMINISTRATOR.

Section.

- 4323. County treasurers ex-officio public administrators. Bond of.
- 4324. Estates administered by public administrators.
- 4325. Public administrator, letters, application; bond and oath.
- 4326. Duty of persons in whose house any stranger dies.
- 4327. Must return inventory, etc.
- 4328. Another person appointed; public administrator's duty.
- 4329. Civil officers to give notice of waste.
- 4330. Suits for property of decedents.
- 4331. Order to examine party charged with embezzling estate.

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- 4332. Punishment for refusing to attend.
- 4333. Order on public administrator to account.
- 4334. Must publish condition of estate, etc.
- 4335. Moneys, etc., paid into state treasury, when.
- 4336. Administrator not to be interested in payments.
- 4337. Failure to pay over money, proceedings to recover.
- 4338. Preceding chapters applicable to public administrator.

Section 4323. County Treasurers Ex-Officio Public Administrators. Bond of: The county treasurers of the various counties of this State are hereby declared to be ex-officio public

administrators in their respective counties. Each public administrator shall, before he enters upon the duties of his office, take and file his official oath and execute and file an official bond, conditioned as the bonds of other county officers, with two good and sufficient sureties, in a sum not less than two thousand dollars; *Provided*, That the probate court may, upon reasonable cause therefor shown, require at any time a new official bond, or an additional bond, to be given upon ten days' notice in writing.

1887 R. S. Sec. 5680.

Section 4324. Estates Administered by Public Administrators: Every public administrator duly qualified, must take charge of the estates of persons dying within his county as follows:

1. Of the estates of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for or lost;
2. Of the estates of decedents who have no known heirs;
3. Of estates ordered into his hands by the probate court; and,
4. Of estates upon which letters of administration have been issued to him by the probate court, as provided in Chapter CLXXXVII of this Title.

1887 R. S. Sec. 5681.

Section 4325. Public Administrator, Letters, Application: Bond and Oath: Whenever a public administrator takes charge of an estate which he is entitled under the provisions of Chapter CLXXXVII, of this Title, to administer without letters of administration being issued, or under order of the court, he must, with all convenient dispatch, procure letters of administration thereon. No notice of application for letters by a public administrator is necessary, and his official bond and oath are in lieu of the administrator's bond and oath; but when real estate is ordered to be sold, another bond may be required by the court.

1887 R. S. Sec. 5682.

Delivering assets to regularly appointed administrators: Secs. 4328 and 4333.

Public administrator must take immediate possession of estate of any person dying without known heirs, without any prior appointment of the probate court. But he holds as special adminis-

trator, and must afterwards have a judicial grant of letters to him in each particular case before he can regularly administer upon the estate. Separate oath and bond however are not required.—Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237. To the same effect see *In re Pingree*, 100 Cal. 78, 34 Pac. 521.

Section 4326. Duty of Persons in whose House Any Stranger Dies: Whenever a stranger or person without known heirs dies intestate in the house or premises of another, the possessor of such premises, or any one knowing the facts, must give immediate notice thereof to the public administrator of the county; and in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any party interested.

1887 R. S. Sec. 5683.

Section 4327. Must Return Inventory, etc: The public administrator must make and return a perfect inventory of all estates taken into his possession, administer and account for the same, according to the provisions of this Title, subject to the control and direction of the probate court. When, as shown by the inventory, the estate amounts to less than two hundred and fifty dollars, no notice to creditors or other formal proceedings by the public administrator are required, but after the payment of the funeral expenses, the expenses of the last sickness and of administration, the probate court must order the residue, if any, converted into money and paid as may be just to such creditors or heirs as may appear, or into the State treasury as provided in this Chapter.

1887 R. S. Sec. 5684.

Section 4328. Another Person Appointed; Public Administrator's Duty: If, at any time, letters testamentary or of administration are regularly granted to any other person on an estate of which the public administrator has charge, he must, under the order of the probate court, account for, pay, and deliver to the executor or administrator thus appointed, all the money, property, papers, and estate of every kind in his possession or under his control.

1887 R. S. Sec. 5685.

Section 4329. Civil Officers to Give Notice of Waste: All civil officers must inform the public administrator of all property known to them, belonging to a decedent, which is liable to loss, injury, or waste, and which, by reason thereof, ought to be in the possession of the public administrator.

1887 R. S. Sec. 5686.

Section 4330. Suits for Property of Decedents: The public administrator must institute all suits and prosecutions necessary to recover the property, debts, papers, or other estate of the decedent.

1887 R. S. Sec. 5687.

Section 4331. Order to Examine Party Charged with Embezzling Estate: When the public administrator complains to the probate judge, on oath, that any person has concealed, embezzled, or disposed of, or has in his possession, any money, goods, property, or effects, to the possession of which such administrator is entitled in his official capacity, the judge may cite such person to appear before the probate court, and may examine him on oath touching the matter of such complaint.

1887 R. S. Sec. 5688.

Section 4332. Punishment for Refusing to Attend: All such interrogatories and answers must be reduced to writing and signed by the party examined, and filed in the probate court. If the person so cited refuses to appear and submit to such an examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may commit him to the county

jail, there to remain in close custody until he submits to the order of the court.

1887 R. S. Sec. 5689.

Section 4333. Order to Public Administrator to Account: The probate court may at any time, order the public administrator to account for and deliver all the money and property of an estate in his hands, to the heirs, or to the executors or administrators regularly appointed.

1887 R. S. Sec. 5690.

Section 4334. Must Publish Condition of Estate, etc: The public administrator must, once in every six months, make to the probate judge, under oath, a return of all estates of decedents which have come into his hands, the value of the same, the money which has come into his hands from each estate, and what he has done with it, and the amount of his fees and expenses incurred, and the balance, if any, remaining in his hands.

1887 R. S. Sec. 5691.

Section 4335. Moneys, etc., Paid into State Treasury, when: After a final settlement of the affairs of any estate, if there be no heirs or other claimants thereof, the public administrator must pay into the State treasury, all moneys and effects in his hands belonging to the estate, as provided in Chapter CXC V, of this Title for payments by agents.

1887 R. S. Sec. 5692.

Section 4336. Administrator not to be Interested in Payments: The public administrator must not be interested in the expenditures of any kind, made on account of any estate he administers; nor must he be associated, in business or otherwise with any one who is so interested.

1887 R. S. Sec. 5693.

Section 4337. Failure to pay over Money, Proceedings to Recover: When it appears, that any money remains in the hands of the public administrator (after a final settlement of the estate) unclaimed, which should be paid over to the State treasurer, the probate judge must order the same to be paid over; and, on failure of the public administrator to comply with the order within ten days after the same is made, the prosecuting attorney for the county must immediately institute the requisite legal proceedings against the public administrator for a judgment against him and the sureties on his official bond, in the amount of money so withheld, and costs.

1887 R. S. Sec. 5694.

Section 4338. Preceding Chapters Applicable to Public Administrator: When no direction is given in this Chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of the preceding Chapters of this Title must govern.

1887 R. S. Sec. 5695.

CHAPTER CXCVIII.

GUARDIAN AND WARD.

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- 4340. When minor may nominate guardian.
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- 4342. Nomination by minors after arriving at fourteen.
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- GENERAL PROVISIONS.**
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GUARDIAN OF MINORS; APPOINTMENT AND DUTIES.**Section 4339. Court to Appoint Guardians, when:**

The probate court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who

reside without the State and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. Before making such appointment, the court must cause such notice as such court deems reasonable to any person having the care of such minor, and to such relatives of the minor in the county as the court may deem proper.

1887 R. S. Sec. 5770.

Infant party to action, etc., guardian:
Secs. 3170, 3171, 4313 and 4358.

Section 4340. When Minor may Nominate Guardian: If the minor is under the age of fourteen years, the probate court may nominate and appoint his guardian. If he is above the age of fourteen years, he may nominate his own guardian, who, if approved by the court, must be appointed accordingly.

1887 R. S. Sec. 5771.

Section 4341. When Judge may Make Appointment: If the guardian nominated by the minor is not approved by the court, or if the minor resides out of the State, or if, after being duly cited by the court, he neglects for ten days to nominate a suitable person, the court may nominate and appoint the guardian, in the same manner as if the minor were under the age of fourteen years.

1887 R. S. Sec. 5772.

Section 4342. Nomination by Minors After Arriving at Fourteen: When a guardian has been appointed by the court for a minor under the age of fourteen, the minor at any time after he attains that age, may appoint his own guardian, subject to the approval of the probate court.

1887 R. S. Sec. 5773.

Section 4343. Father or Mother Entitled to Guardianship: Either the father or mother of a minor, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor.

1887 R. S. Sec. 5774, amended 1899. Bond, testamentary guardian must
5th Ses. p. 302; 1897, 4th Ses. p. 55. give: Sec. 4351.

Section 4344. Minor Having no Parents: If the minor has no father or mother living, competent to have the custody and care of his education, the guardian appointed shall have the same.

1887 R. S. Sec. 5775.

Section 4345. Powers and Duties of Guardian: Every guardian appointed shall have the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged.

1887 R. S. Sec. 5776.

An order of a court of probate that moneys of a decedent or of a ward be held by a deposit company and paid

out only as authorized by the court is void, where the statute exacts security from guardians and administrators, and gives them a right to the exclusive

possession and general care and management of the estates committed to their charge.—*De Greayer v. Superior Court*, 117 Cal. 640, 49 Pac. 983, 59 Am. St. Rep. 220.

Section 4346. Bond of Guardian, Conditions of: Before the order appointing any person guardian under this Chapter takes effect, and before letters issue, the judge must require of such person a bond to the minor, with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law; and the following conditions shall form a part of such bond, without being expressed therein:

1. To make an inventory of all the estate, real and personal, of his ward that comes to his possession or knowledge, and to return the same within such time as the judge may order;

2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward;

3. To render an account, on oath, of the property, estate, and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs; and at the expiration of his trust to settle his accounts with the court or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto. Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form, the letters of guardianship must be substantially the same as letters of administration; and the oath of the guardian must be indorsed thereon that he will perform the duties of his office, as such guardian, according to law.

1887 R. S. Sec. 5777.

Section 4347. Special Conditions in Order Appointing: When any person is appointed guardian of a minor, the probate court may, with the consent of such person, insert in the order of appointment conditions not otherwise obligatory, providing for the care, treatment, education, and welfare of the minor. The performance of such conditions is a part of the duties of the guardian, for the faithful performance of which he and the sureties on his bond are responsible.

1887 R. S. Sec. 5778.

Section 4348. Letters of Guardianship, Bond: All letters of guardianship issued, and all guardians' bonds executed under the provisions of this Chapter, with the affidavits and certificates thereon, must be recorded by the clerk of the probate court having jurisdiction of the persons and estates of the wards.

1887 R. S. Sec. 5779.

Section 4349. Maintenance of Minor out of His own Property:

If any minor, having a father living, has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the probate court; and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian.

1887 R. S. Sec. 5780.

Section 4350. Appointment by Will or Deed: A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing:

1. If the child be legitimate, by the father, with the written consent of the mother, or by either parent, if the other be dead or incapable of consent;

2. If the child be illegitimate, by the mother.

1887 R. S. Sec. 5781.

RIGHT OF MOTHER TO HAVE CUSTODY OF CHILD: If the father dies, having appointed a guardian for his children by his last will and testament, but leaving a widow who is a qualified and fit person to have the personal custody of her children, such widow is entitled, if she so desires, to the personal care and custody of the children. In such case the power of the testamentary guardian only ex-

tends to such special directions as the father may have given in his will with reference to the education and settlement of his children, and the care and management of their property, and does not include the personal custody of the children, if objection thereto be made by the mother.—*Lord v. Hough*, 37 Cal. 657, but see *Matter of Van Houten* (N. J.), 29 Am. Dec. 707 and note on page 712.

Section 4351. Guardian to Give Bond; Powers Limited: Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties, with regard to the person and estate of his ward, as guardians appointed by the probate court, except so far as their powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed.

1887 R. S. Sec. 5782.

Bond of guardian: Sec. 4346.

Section 4352. Power of Courts to Appoint in Suits Nothing contained in this Chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein.

1887 R. S. Sec. 5783.

INSANE AND INCOMPETENT PERSONS.

Section 4353. Insane and Other Incompetent Persons: When it is represented to the probate judge, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge

must cause a notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

1887 R. S. Sec. 5784.

Section 4354. Appointment by Probate Judge After Hearing: If, after a full hearing and examination upon such petition, it appears to the probate court that the person in question is incapable of taking care of himself and managing his property, the court must appoint a guardian of his person and estate, with the powers and duties in this Chapter specified.

1887 R. S. Sec. 5785.

Section 4355. Powers and Duties of Such Guardians: Every guardian appointed, as provided in the preceding Section, has the care and custody of the person of his ward, and the management of all his estate until such guardian is legally discharged; and he must give bond to such ward in like manner and with like conditions as before prescribed with respect to the guardian of a minor.

1887 R. S. Sec. 5786.

Section 4356. Proceedings for Restoration of Insane, etc: Any person who has been declared insane or incompetent, or the guardian or any relative of such person, or any friend may apply by petition, to the probate court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition shall be verified and shall state that such person is then sane or competent.

Upon receiving the petition the court must appoint a day for a hearing before the court, and if the petitioner request it, shall order an investigation before a jury, which shall be summoned and impaneled in the same manner as juries are summoned and impaneled in civil actions. The court shall cause notice of the trial to be given to the guardian of the person so declared insane or incompetent, if there be a guardian, and to his or her husband or wife, if there be one, and to his or her father or mother, if living in the county. On the trial the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court, any other person may contest the right to the relief demanded. Witnesses may be required to appear and testify, as in civil cases, and may be called and examined by the court on its own motion. If it be found that the person be of sound mind and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person, if such person be not a minor, shall cease.

1887 R. S. Sec. 5787.

GENERAL POWERS AND DUTIES.

Section 4357. To Pay Debts out of Ward's Estate: Every guardian appointed under the provisions of this Chapter,

whether for a minor or any other person, must pay all just debts due from the ward, out of his personal estate and the income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided in this Title for the sale of real estate of decedents.

1887 R. S. Sec. 5788.

Section 4358. To Recover Debts due Ward: Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the probate judge, compound for the same and give discharges to the debtors on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose.

1887 R. S. Sec. 5789.

A guardian appointed by the probate court is not a trustee of an express trust within the meaning of Sec. 3318, ante. An action to recover money due the infant must be brought in the name of the infant by his guardian. The guardian can not sue in his own name.—*Fox v. Minor*, 32 Cal. 111, 91 Am. Dec. 566.

The general guardian of an infant or

incompetent person has authority, without the service of any process whatever, to enter the appearance of his ward in an action pending against him, and such appearance confers jurisdiction upon the court to the same extent as if the process had been personally served in the manner prescribed by statute.—*Redmond v. Peterson*, 102 Cal. 595, 36 Pac. 923, 41 Am. St. Rep. 204.

Section 4359. Manage Estate, Maintain Ward, Sell Real Estate: Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance, support and education of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order of the court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

1887 R. S. Sec. 5790.

Sale: Secs. 4366 et seq.

A guardian loaning the moneys of his wards, and taking notes and mortgages therefor in his own name, thereby unnecessarily and willfully mingles the trust property with his own, and becomes liable for its safety in all events, and is not, in his accounts, entitled to be credited with the amounts so loaned.—*Matter of Bane*, 120 Cal. 533, 52 Pac. 852, 65 Am. St. Rep. 197.

Mechanic's lien can not be enforced against the property of minors, where the contract under which the work was done or materials furnished was en-

tered into on their behalf by their guardian without first obtaining an order of court authorizing him so to do.—*Fish v. McCarthy*, 96 Cal. 484, 31 Pac. 529, 31 Am. St. Rep. 237. Party contracting with guardian to erect buildings on property of infant ward has no equitable lien upon the property for the value of the improvements, if the contract was made without any legal authority on the guardian's part and with full knowledge of the title and condition of the property on the part of the other party.—*Guy v. Du Uprey*, 16 Cal. 195, 75 Am. Dec. 518.

Section 4360. Maintenance, Support and Education of Ward: When a guardian has advanced, for the necessary maintenance, support, or education of his ward, an amount not disproportionate to the value of his estate, or his condition of life, and the same is made to appear to the satisfaction of the court by proper

vouchers and proofs, the guardian must be allowed credit therefor in his settlements.

Whenever a guardian fails, neglects, or refuses to furnish suitable and necessary maintenance, support or education for his ward, the court may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support, or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

1887 R. S. Sec. 5791.

Section 4361. May Assent to Partition of Real Estate: The guardian may join in and assent to a partition of the real estate of the ward, wherever such assent may be given by any person.

1887 R. S. Sec. 5792.

and 3160.

Guardian, appearance by: Secs. 4313 , Partition, assent to: Sec. 3437.

INVENTORY, ACCOUNT AND COMPENSATION.

Section 4362. Inventory. Appraisers Appointed, After Acquired Property: Every guardian must return to the probate court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. The probate court may, upon application for that purpose by any person, compel the guardian to render an account to the probate court of the estate of his ward. The inventories and accounts so to be returned or rendered must be sworn to by the guardian. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acting in the manner provided for regulating the settlement of the estate of decedents. Such inventory, with the appraisement of the property therein described, must be recorded by the clerk of the probate court in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return.

1887 R. S. Sec. 5793.

Section 4363. Settlements of Guardians: The guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as may be required, present his account to the probate court for settlement and allowance.

1887 R. S. Sec. 5794.

The settlement of a guardian's accounts by a probate court does not conclude his ward as to property fraudulently withheld from the account. Hence, after such settlement, a bill in equity may be sustained by the ward

against his guardian to compel the latter to account for property which he fraudulently withheld from the account, and the existence of which he concealed from the court.—*Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219 and note.

Section 4364. Allowance of Accounts: When an account is rendered by two or more joint guardians, the probate judge may, in his discretion, allow the same upon the oath of any of them.

1887 R. S. Sec. 5795.

Section 4365. Expenses and Compensation of Guardian: Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable.

1887 R. S. Sec. 5796.

SALE OF PROPERTY AND INVESTMENT.

Section 4366. May Sell Property in Certain Cases: When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

1887 R. S. Sec. 5797.

A guardian may mortgage the estate of his ward under an order of court directing him to do so, when the purpose of the mortgage is to raise money to

discharge a pre-existing mortgage and prevent the foreclosure thereof.—*Northwestern Guaranty Loan Co. v. Smith*, 15 Mont. 101, 38 Pac. 224, 48 Am. St. Rep. 662.

Section 4367. Sale of Real Estate made upon Order of Court: When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor.

1887 R. S. Sec. 5798.

Section 4368. Application of Proceeds of Sales: If the estate is sold for the purposes mentioned in this Chapter, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

1887 R. S. Sec. 5799.

Section 4369. Investments of Proceeds of Sales: If the estate is sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the probate court.

1887 R. S. Sec. 5800.

Section 4370. Order of Sale, how Obtained: To obtain an order for such sale, the guardian must present to the probate

court of the county in which he was appointed guardian, a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.

1887 R. S. Sec. 5801.

Section 4371. Notice to Next of Kin, how Given: If it appears to the court or judge, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold; or that the real and personal estate should be sold, the court or judge must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appears that it is necessary or would be beneficial to the ward to sell the personal estate or some part of it, the court must order the sale to be made.

1887 R. S. Sec. 5802.

Proceedings by a guardian for the sale of the estate of his ward are not adverse, but are in effect proceedings by him for his benefit. The minor is in court by the filing of his petition and

thereby submits his property to the jurisdiction of the court. The order of sale is not against or adverse to him, but is the granting of his request.—*Scarf v. Aldrich*, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190 and note.

Section 4372. Copy of Order to be Served, etc: A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least three successive weeks in a newspaper printed in the county, if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order.

If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published.

1887 R. S. Sec. 5803.

Section 4373. Hearing of Application: The probate court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner and of the next of kin, and of all other persons interested in the estate who oppose the application.

1887 R. S. Sec. 5804.

Section 4374. Who Examined on Such Hearing: On the hearing the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the probate court or judge, in the same manner and with like effect as in other cases provided for in this Title.

1887 R. S. Sec. 5805.

Section 4375. Costs to be Awarded, to whom: If any person appears and objects to the granting of any order prayed for under the provisions of this Chapter, and it appears to the court that either the petition or the objection thereto is sustained, the court may, in granting or refusing the order, award costs to the party prevailing, and enforce the payment thereof.

1887 R. S. Sec. 5806.

Section 4376. Order of Sale to Specify what: If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part thereof should be sold, the court may grant an order therefor, specifying therein, the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale.

1887 R. S. Sec. 5807.

Section 4377. Bond Before Selling. Proceedings: Every guardian authorized to sell real estate must, before the sale, give bond to the ward, with sufficient surety, to be approved by the court, or a judge thereof, with condition to sell the same in the manner, and to account for the proceeds of the sale, as provided for in this Chapter, and Chapter CXCI of this Title.

1887 R. S. Sec. 5808.

The sureties on a guardian's bond, given in compliance with an order authorizing him to sell real estate belonging to his ward, and conditioned that he will faithfully execute the duties of the trust according to law, are answerable for the guardian's misappropriation of funds realized from such

sale; and a judgment against the guardian declaring him to be indebted to the ward's estate, in a given sum, the amount of such misappropriation, is binding upon the sureties, though they were not parties to the suit.—*Botkin v. Kleinschmidt*, 21 Mont. 1, 52 Pac. 563, 69 Am. St. Rep. 641.

Section 4378. Proceedings for Sale of Property: All the proceedings under petition of guardians for sales of property of their wards, giving notice and the hearing of such petitions, granting or refusing the order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of account, must be had and made as required by the provisions of this Title concerning estates of decedents, unless otherwise specially provided in this Chapter.

1887 R. S. Sec. 5809.

Section 4379. Limit of Order of Sale: No order of sale granted in pursuance of this Chapter continues in force more than one year after granting the same, without a sale being had.

1887 R. S. Sec. 5810.

Section 4380. Conditions of Sales of Real Estate. Mortgage for Deferred Payments: All sales of real estate of wards must be for cash, or for part cash and part deferred pay-

ments, not to exceed three years, bearing date from date of sale, as, in the discretion of the probate judge, is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers bond and mortgage on the real estate sold, with such additional security as the judge deems necessary and sufficient to secure the faithful payment of the deferred payments and the interest thereon.

1887 R. S. Sec. 5811.

Section 4381. May Order Investment of Money: The probate court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the probate judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the probate court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require.

1887 R. S. Sec. 5812.

GUARDIANS OF NON-RESIDENTS AND TRANSFER TO FOREIGN GUARDIANS.

Section 4382. Guardian of Non-Resident Persons: When a person liable to be put under guardianship, according to the provisions of this Chapter, resides without this State, and has estate therein, any friend of such person, or anyone interested in his estate, in expectancy or otherwise, may apply to the probate court of any county in which there is any estate of such absent person, for the appointment of a guardian; and if, after notice given to all interested, in such manner as the judge orders, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed.

1887 R. S. Sec. 5813.

Section 4383. Powers and Duties of Guardian: Every guardian, appointed under the preceding Section, has the same powers and perform the same duties, with respect to the estate of the ward found within this State, and with respect to the person of the ward, if he shall come to reside therein as are prescribed with respect to any other guardian appointed under this Chapter.

1887 R. S. Sec. 5814.

Section 4384. Guardian to Give Bonds: Every guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this state.

1887 R. S. Sec. 5815.

Section 4385. To What Guardianship shall Extend: The guardianship which is first lawfully granted, of any person re-

siding without this state, extends to all the estate of the ward within the same, and excludes the jurisdiction of the probate court of every other county.

1887 R. S. Sec. 5816.

Section 4386. Removal of Non-Resident Ward's Property: When the guardian and ward are both non-residents, and the ward is entitled to property in this state which may be removed to another state, territory or foreign country without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state, territory, or foreign country of the residence of the ward, upon the application of the guardian to the probate court of the county in which the estate of the ward, or the principal part thereof, is situated.

1887 R. S. Sec. 5817.

Section 4387. Proceedings on such Removal: The application must be made upon ten days' notice to the resident executor, administrator, or guardian, if there be such, and upon such application, the non-resident guardian must produce and file a certificate under the hand of the clerk, and seal of the court from which his appointment was derived, showing:

1. A transcript of the record of his appointment;
2. That he has entered upon the discharge of his duties;
3. That he is entitled by the laws of the state or territory of his appointment to the possession of the estate of the ward.

Upon such application, unless good cause to the contrary is shown, the probate court must make an order, granting to such guardian leave to take and remove the property of his ward to the state or place of his residence, which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward.

1887 R. S. Sec. 5818.

Section 4388. Discharge of Person in Possession: Such order is a discharge of the executor, administrator, local guardian, or other person in whose possession the property may be at the time the order is made, on filing with the probate court the receipt therefor of the foreign guardian of such absent ward.

1887 R. S. Sec. 5819.

BOND, SURETIES, LIMITATION OF ACTION.

Section 4389. New Bond, when Required: The probate judge may require a new bond to be given by a guardian whenever he deems it necessary, and may discharge the existing sureties from further liability, after due notice given as he may direct, when it shall appear that no injury can result therefrom to those interested in the estate.

1887 R. S. Sec. 5823.

Section 4390. Guardian's Bond to be Filed: Every bond given by a guardian must be filed and preserved in the office of the clerk of the probate court of the county; and in case of a breach

of a condition thereof, may be prosecuted for the use and benefit of the ward or of any person interested in the estate.

1887 R. S. Sec. 5824.

Section 4391. Limitation of Action on Bond: No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if at the time of such discharge, the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.

1887 R. S. Sec. 5825.

DISCHARGE OF GUARDIAN, WHAT IS: Within the meaning of the statute of limitations providing that no action can be maintained on any bond given by a guardian, unless commenced within three years from his discharge

or removal, the death of the ward must be treated as the discharge of the guardian, and therefore an action against the latter's sureties must be commenced within three years after such death.—*Perkin v. Marsh*, 18 Mont. 152, 44 Pac. 528, 56 Am. St. Rep. 565.

Section 4392. Limitation of Actions for Recovery of Property Sold: No action for the recovery of any estate sold by a guardian can be maintained by the ward or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.

1887 R. S. Sec. 5826.

Section 4393. Certain Provisions Apply to Guardians: The provisions as to qualification and justification of sureties to undertakings, are hereby declared to apply to guardians appointed by the court, and to the bonds taken, or to be taken, from such guardians, and to the sureties on such bonds.

1887 R. S. Sec. 5829.

Sureties, qualification, justification etc.: Sec. 3749 et seq.

REMOVAL, RESIGNATION, TERMINATION.

Section 4394. Removal and Resignation of Guardian. Surrender of Estate: When a guardian, appointed either by the testator or the probate court, becomes insane or otherwise incapable of discharging his trust, or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days after being required to render an account or make a return, the probate court may, upon such notice to the guardian as the court may require, remove him and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto. Every guardian may resign when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the probate court or the judge thereof may appoint another in the place of the guardian who has resigned or has been removed,

1887 R. S. Sec. 5821.

Section 4395. Guardianship, how Terminated: The marriage of a minor ward terminates the guardianship, and the guardian of an insane or other person may be discharged by the probate court when it appears to him, on the application of the ward, or otherwise, that the guardianship is no longer necessary.

1887 R. S. Sec. 5822.

GENERAL PROVISIONS.

Section 4396. Examination of Persons Suspected of Defrauding Wards: Upon complaint made to him by any guardian, ward, creditor, or other person interested in the estate, or having a respective interest therein as heir or otherwise, against any one suspected of having concealed, embezzled, or conveyed away, any of the money, goods, or effects, or an instrument in writing, belonging to the ward or his estate, the probate judge may cite such suspected person to appear before him, and may examine and proceed with him on such charge in the manner provided in this title with respect to persons suspected of and charged with concealing or embezzling the effects of a decedent.

1887 R. S. Sec. 5820.

Section 4397. More than one Guardian may be Appointed: The court, in its discretion, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian.

1887 R. S. Sec. 5827.

Section 4398. Power of Probate Judge at Chambers: The power conferred upon the probate judge in relation to guardians and wards, may be exercised by him at chambers, or as the act of the probate court, when holding such court; and any order appointing a guardian must be entered as, and become a decree of the court. The provisions of this title relative to the estates of decedents, so far as they relate to the practice in the probate or district courts, apply to proceedings under this chapter.

1887 R. S. Sec. 5828.

CHAPTER CXCIX.

APPEALS TO DISTRICT COURT IN PROBATE MATTERS.

Section.

4399. When may be taken.

4400. Executors, etc., not required to give undertaking.

Section.

4401. Acts not invalidated. Reversal of order appointing executor, etc.

Section 4399. When may be Taken: An appeal may be taken to the district court of the county from a judgment or order of the probate court in probate matters:

1. Granting, refusing or revoking letters testamentary, or of administration, or of guardianship;

2. Admitting, or refusing to admit, a will to probate;

3. Against or in favor of the validity of a will, or revoking the probate thereof;
4. Against or in favor of setting apart property, or making an allowance for a widow or child;
5. Against or in favor of directing the partition, sale, or conveyance of real property;
6. Settling an account of an executor, or administrator, or guardian;
7. Refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share;
8. Confirming report of appraiser setting apart the homestead.

1887 R. S. Sec. 4831.

Appeal to be taken within sixty days: Sec. 4316.

Application of provisions of Code of Civil Procedure to new trials and appeals in probate matters: Sec. 4315.

Appeal, execution for costs on: Sec. 4321.

Under the provisions of Sub-division

5, Section 4831, Rev. St. an order denying the issuance of an order to show cause why the real estate of a decedent should not be sold to pay claims against his estate is an appealable order.—State ex rel. Missoula Mercantile Co. v. Whelan, Probate Judge (Idaho), 53 Pac. 2.

Section 4400. Executors, etc., not Required to Give Undertaking: When an executor, administrator or guardian who has given an official bond, appeals from a judgment or order of the probate court made in the proceedings had upon the estate of which he is administrator, executor, or guardian, his official bond stands in the place of an undertaking on appeal, and the sureties therein are liable as on such undertaking.

1887 R. S. Sec. 4832.

Executors and administrators may be

relieved from giving undertaking on appeal by order of the court: Sec. 3580.

Section 4401. Acts not Invalidated. Reversal of Order Appointing Executor, etc: When the order or decree appointing an executor, administrator, or guardian, is reversed on appeal for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, administrator or guardian, if he have qualified, are as valid as if such order or decree had been affirmed.

1887 R. S. Sec. 4833.

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GENERAL PROVISIONS.

Section 4402. Questions of Law Addressed to Court:

All questions of law arising upon the trial, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court when submitted and before the trial proceeds, and all discussions of law are to be addressed to the court.

Certificate of discharge in an insolvency proceeding is prima facie evidence only of the regularity of the same: Sec. 3941.

Conditions precedent, performance of contract: Sec. 3178.

Decree, administrator's account, allowance by probate court prima facie evidence against minor: Sec. 4257.

Possession presumed from legal title: Sec. 3120.

Proof customs in mining districts: Sec. 3388.

Proof in libel and slander by defendant: Sec. 3232.

Section 2736 of the Civil Code provides that a written instrument is presumptive evidence of consideration.

Section 2737 states that the burden of proof is on the party seeking to invalidate.

ACQUIESCENCE: What has been done and long acquiesced in, until the rights of third parties have grown up thereunder, should be presumed to have been rightly done.—*Hazard v. Cole*, Idaho, 276.

ESTOPPEL: In order to create an equitable estoppel there must be an admission, act, or declaration, intended to influence the conduct of another and actually leading him into a line of conduct, which would be prejudicial to his interest, unless the party estopped be cut off from the power of retraction.—*Leland v. Isenberg*, 1 Idaho, 469.

RES GESTAE: In order to entitle declarations to be received in evidence as part of the res gestae, they must be a part of an act, and such as may serve to explain or qualify it, and must have been made while such act was being performed.—*Kramer v. Settle*, 1 Idaho, 485.

Time is not necessarily a controlling element or principle in the matter of res gestae.—*Coffin v. Bradbury* (Idaho), 35 Pac. 715.

ADMISSIONS, EVIDENCE, TELEGRAM: A telegram from P. to M., whom P. had employed to perform certain services, contained these words: "I will leave in about a week direct for the mine." Held, admissible in an action by M. against administrators of P. for value of services as tending to prove that the relation of employer and employee existed at the date of the telegram.—*Meinert v. Snow*, 2 Idaho, 851, 27 Pac. 677.

Written admissions of the defendants in their original answer are still admissions tending to establish facts thus admitted, and are as much evidence to be considered as any other admissions, notwithstanding they were stricken out on defendant's own motion.—*Bloomington v. Du Rell*, 1 Idaho, 33.

ADMISSION, COMPETENCY: A

paper in the form of an answer, verified by the defendants, admitting that the allegations of the complaint are true and consenting that the plaintiffs are entitled to the judgment as prayed for in the complaint, is a sworn admission of the defendants. The court erred in refusing to admit the same in evidence on behalf of the plaintiffs, although said sworn statement was made without the knowledge or consent of the defendant's attorneys of record.—*Pence v. Sweeny*, 2 Idaho, 914, 28 Pac. 413.

RECEIPTS AND RELINQUISHMENTS, COMPETENCY AS EVIDENCE: The receipts and relinquishments signed by the defendants, although made without the knowledge or consent of the attorneys of record, are testimony in favor of the plaintiffs, and it is error for the trial court to refuse to receive them.—*Pence v. Sweeny*, 2 Idaho, 914, 28 Pac. 413.

ADMISSIONS AND DECLARATIONS OF AGENT: Admissions and declarations made by an agent after an accident has occurred can not be admitted to show the negligence of the principal.—*Holt v. Spokane & P. Ry. Co.* (Idaho), 35 Pac. 39.

The acts or declarations of a party to a fraudulent transfer of property are admissible as evidence, though he is not a party to the suit, and though not made in the presence of the party claiming to be the purchaser of the property.—*Ferbrache v. Martin* (Idaho), 32 Pac. 252.

Declarations of a grantor, made long prior to his deed, and inconsistent therewith, are not admissible for the purpose of impeaching such deed.

The evidence of subscribing witnesses to a deed, and of persons who are familiar with the grantor and the transaction involved, are entitled to great weight, while the opinion of an expert witness is entitled to but little weight as against such evidence.—*Kelly v. Perreault* (Idaho), 48 Pac. 45.

No conversation or agreement had or made prior to the time of the execution of a written contract tending to vary or dispute the provisions thereof, are proper considerations for the jury and can not be given in evidence.—*Jacobs v. Shenon*, 2 Idaho, 1002, 29 Pac. 44.

In the absence of fraud, accident, or mistake, parol evidence of an oral agreement contemporaneously made with the execution of a promissory note can not be admitted to show that such note, although made payable in money, was by such agreement to be paid in work and labor.—*Stein v. Fogarty* (Idaho), 43 Pac. 681.

In an action on an acceptance for the construction under a written contract of an irrigating ditch, evidence of a

conversation between the parties at the time of making the contract was properly excluded.—*Bradbury v. Idaho & O. Land Co.* 2 Idaho, 221, 10 Pac. 620.

PAROL EVIDENCE, WHEN ADMISSIBLE: When the grantee of a mortgagor buys in and takes assignment of a mortgage upon the premises conveyed, the mortgage so purchased does not merge, except in the case when the grantee has assumed payment of mortgage as part of consideration for the conveyance of the fee, or has manifested or declared an intention to have it merge.

Presumptions are against merger where it is manifestly for the interest of the grantee that the charge should not merge.

Parol evidence is admissible to show all the facts and circumstances attending the transfer, to establish the intention of the purchaser of mortgage.—*Westheimer v. Thompson* (Idaho); 32 Pac. 205.

ACTION ON NOTE, PAROL EVIDENCE, COMPETENCY: In an action on a promissory note it appeared that plaintiff wished defendant to manage a mine which he was to purchase, and the defendant was unwilling to do so without an interest in it; that plaintiff paid for the mine and had it conveyed to them jointly and took defendant's note for half the purchase price. Held, that parol evidence of a contemporaneous agreement that defendant might examine the mine and if dissatisfied, convey his interest to the plaintiff, and the note should be cancelled, was inadmissible as varying the terms of the note. *Berry, J. dissenting.*—*Dulaney v. Burke*, 2 Idaho, 686, 23 Pac. 425.

The identity of the sum included in the promissory note, with interest due on the pre-existing debt, and that it was given for such interest, may be proven by parol testimony.—*Kelly v. Leachman* (Idaho), 33 Pac. 44.

PAROL EVIDENCE, WHEN ADMISSIBLE: In a suit growing out of a contract of settlement which is not reduced to writing, the contract itself may be proven, although the evidence proving it contradicts recitals in a receipt connected with the transaction.—*Barghoorn v. Moore* (Idaho), 57 Pac. 265.

ADMISSION OR REJECTION OF EXPERT TESTIMONY: The admission or rejection of expert testimony in a given case must rest largely in the discretion of the trial court, and where it is evident that such testimony, if admitted, would tend to aid the jury in coming to a satisfactory conclusion upon the facts, such admission is not error.—*State v. Hendel* (Idaho), 35 Pac. 836.

A hypothetical question propounded to an expert witness should be predicated upon facts proven, or facts which the evidence in the particular case tends to establish, and not upon conjecture.—*Kelly v. Perrault* (Idaho), 48 Pac. 45.

EVIDENCE, OPINION OF WITNESS: Defendant was indicted for robbery. H., a witness for prosecution, testified that he saw defendant scuffling with Miles (the party alleged to have been robbed); saw defendant hand something to McLouthin, co-respondant, and alleged accomplice of defendant. Witness said he "thought" defendant took what he handed to McLouthin from the person of Miles; did not see him take it but "thought he did because he thought he did." Motion to strike out latter part of testimony, as to what witness "thought" denied. Held, such denial was error, as it was not a matter upon which the opinion of witness was permissible.—*Territory v. McKern*, 2 Idaho, 759, 26 Pac. 123.

CONFLICT OF EVIDENCE, VERDICT OF JURY NOT DISTURBED: Where there is a substantial conflict in the evidence, the verdict of a jury will not be disturbed by the appellate court, unless it is plainly contrary to the decided weight of evidence.—*Hawkins v. Pocatello Water Co. Limited* (Idaho), 35 Pac. 711.

ERROR: It is not error for the court below to admit improper evidence, such as a sheriff's deed, without first showing in a valid judgment, no objection to its introduction having been made.—*Leland v. Isenbeck*, 1 Idaho, 469.

In an action against a city to recover for an injury received by reason of the dangerous condition of a street, it is prejudicial error to permit the plaintiff to show that after the accident the defendant promptly remedied the defect which caused the accident.—*Giffin et ux. v. City of Lewiston* (Idaho), 55 Pac. 545.

PREJUDICIAL ERROR: Over the objection of the defendant in an action for damages for negligently causing the death of a minor child the respondent was permitted to show that appellant filled said well some days after the death of the child. Held, prejudicial error.—*Holt v. Spokane & P. Ry. Co.* (Idaho), 35 Pac. 39.

PROOF OF PARTNERSHIP: The allegation of partnership being denied, the burden of proving it by such competent evidence as is accessible to them devolves upon the plaintiffs, but the fact being peculiarly within the knowledge, it being less known to plaintiffs than to the defendant, slight proof on the part of the plaintiffs is

sufficient. It is not necessary that the evidence should bear directly upon the issue. It is admissible if it tends to prove it, or constitutes a link in the chain of proof, or is capable of affording an inference as to the fact of partnership.—*Lillienthal & Co. v. Anderson*, 1 Idaho, 673.

EVIDENCE PROVING FRAUD: Circumstances are admissible to prove fraud, ex necessitate, that would not be admissible in ordinary cases.—*Sears v. Lydon* (Idaho), 49 Pac. 122.

The evidence in this case examined, and held not to establish fraud.—*Fel-land v. Vollmer Mining & Mercantile Co.* (Idaho), 53 Pac. 268.

EVIDENCE, RESULTING TRUSTS. The evidence shows that plaintiff established a resulting trust in his favor, and made a prima facie case.—*Lewis v. Lewis* (Idaho), 33 Pac. 38.

RESULTING TRUST IN LAND. To establish a resulting trust in land, the evidence must be so clear and certain as to leave no well founded doubt upon the subject.—*Rice v. Rigley* (Idaho), 61 Pac. 290.

In an ordinary equity suit, the allegations of the complaint may be established by a preponderance of the evidence, but to establish a trust in land and to obtain a decree for specific performance, the contract sought to be enforced must be fully and clearly proved. A mere preponderance of evidence is not sufficient.—*Rice v. Rigley* (Idaho), 61 Pac. 290.

Evidence in this case examined and held not to support the judgment.—*Kelly v. Railroad Co.* (Idaho), 38 Pac. 404, distinguished; *Jones v. Oregon Short Line R. Co.* (Idaho), 56 Pac. 77.

Where the defendant relies upon the defense of an alibi, the burden of establishing such defense is upon the defendant; and, if the defendant succeeds, by competent evidence, in establishing a time and place, when and where the offense was committed, when the committing of the offense by him made his presence inoperative, he is entitled to acquittal. The character and extent of the evidence requisite to create such doubt is matter for the jury.—*State v. Webb* (Idaho), 55 Pac. 892.

Where the plea of insanity is interposed, it is sufficient for the state, in offering testimony in rebuttal of such a plea, to show by witnesses on its part that they had an intimate acquaintance with the defendant for years, and up to the time of the homicide, to qualify such witnesses to testify as to their opinion as to the insanity of the defendant.—*State v. Hurst* (Idaho), 39 Pac. 554.

The well established rule in the enforcement of the statutes against coun-

terfeiting in all the states, is that the knowingly and secretly keeping instruments adapted and intended for the unlawful business is made proof of the guilty aim to use them for the evil purpose for which they were evidently designed. It is a presumption that the prisoner is called upon to rebut.—*People v. Page*, 1 Idaho, 102.

ADMISSIONS OF DEFENDANT, UNDER ARREST, PROPER TESTIMONY: Voluntary statements made by a defendant at the time of and while under arrest, it not appearing that the same were made or induced by any promise or hope of benefit to accrue to him therefrom, are proper to be proved on his trial.—*State v. Ellington*, 43 Pac. 60.

Conditions under which statements made by defendant were held not voluntarily made, and therefore not admissible as evidence against him.—*State v. Mason* (Idaho), 43 Pac. 63.

ADMISSIONS OF DEFENDANT UNDER ARREST, WHEN NOT PROPER TESTIMONY: A statement made by a defendant while under arrest and in jail, in charge of his accuser, and not connecting said defendant with the alleged crime, is not admissible in evidence.—*State v. Crump* (Idaho), 47 Pac. 814; *State v. Mason* (Idaho), 43 Pac. 63.

The defendant was a cattle man; the deceased a sheep man. The state was permitted, over the objections of the defendant, to prove that the accused was making war against the sheep men generally, and threatening the lives of all sheep men who failed to keep off a certain range. The deceased, a sheep man, was killed on such range, and the circumstances pointed to the accused as the guilty party. Held, that the evidence objected to was competent, as it tended to show motive on the part of the defendant.—*State v. Davis* (Idaho), 53 Pac. 678.

Where it appeared from the evidence that the defendant, the prosecuting witness, and others, had been together, drinking, from 10 o'clock in the evening until 5 o'clock in the morning, when the robbery was alleged to have taken place, the prosecution upon the trial having confined their examination of the prosecuting witness to the first meeting of said witness and the defendant, and to the occurrences at the time of the alleged robbery, leaving an interim of some seven hours, during which, it seems, the parties were continually together, unexplained, it was error to refuse to permit the defense to interrogate the prosecuting witness as to his acts and whereabouts during such interim.—*State v. Webb* (Idaho), 55 Pac. 892.

Where there is a substantial conflict in the material evidence, and there has been improper and prejudicial evidence introduced by the state, this court will not undertake to determine whether the conflicting evidence is sufficient to establish the guilt of the defendant beyond a reasonable doubt.—*Anthony v. State (Idaho)*, 55 Pac. 884.

Where improper and prejudicial evidence is introduced by the state, a judgment against the defendant must be set aside, and the cause remanded.—*Anthony v. State (Idaho)*, 55 Pac. 884.

Evidence in this case examined and held not to support the verdict of guilty.—*State v. Baker (Idaho)*, 56 Pac. 81.

CROSS-EXAMINATION OF ACCUSED: Where a defendant charged with murder becomes a witness in his own behalf, and denies the killing, a wide range of cross-examination may be allowed, because of the general nature of defendant's statement.—*People v. Mullings*, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223 and note.

Objections to class of incompetent testimony need not be repeated to every question of the kind asked, especially when a motion to strike out all such evidence is made and overruled at the close of the examination of the witness.—*People v. Mullings*, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223.

Erroneous rejection of evidence which could not change result is no ground for the reversal of a judgment.—*Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519.

OBJECTIONS TO EVIDENCE: Unless evidence is not admissible for any purpose, a party is not at liberty under a general objection to afterwards urge a special objection going merely to the form of the question by which the evidence was sought.—*Eachus v. Los Angeles, Etc. Ry. Co.* 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

ERROR IN ADMITTING TESTIMONY CURED BY INSTRUCTIONS: If the court errs in the admission of testimony during the trial, but afterwards instructs the jury to disregard such testimony, the error is not sufficient to entitle the party objecting to the testimony to a new trial.—*Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145.

Where evidence, immaterial when admitted, is rendered material by an amendment of the complaint during the trial, the error is cured.—*Curtis v. Aetna Life Insurance Co.* 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114.

Testimony ruled out by the court for one purpose, but admitted for another, can only be considered by the jury for the purpose for which it was received.

—*Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98.

ESTOPPEL: Matter of estoppel is as conclusive when admitted in evidence as if pleaded, when there has been no opportunity to plead it.

Operation of judgment as estoppel is not affected by the fact that a motion for a new trial is pending in the action in which it is given.—*Young v. Brehe*, 19 Nev. 379, 12 Pac. 564, 3 Am. St. Rep. 892.

Judgment is estoppel only when it appears that the matter which it is claimed a party is estopped from denying was determined in the judgment.—*Le Roy v. Rogers*, 30 Cal. 229, 89 Am. Dec. 88.

WHAT WILL CONSTITUTE AN ESTOPPEL IN PAIS: Whenever an act is done or statement made by a party which can not be contravened or contradicted by him without fraud on his part and injury to others, whose conduct, without fault on their part, has been influenced by the act done or statement made, the character of estoppel will attach to what would otherwise be mere matter of evidence; but such estoppel must be pleaded with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits in equity, but if evidence is introduced without objection and a verdict is rendered the objection to the pleading will be deemed waived.—*Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157 and note.

It is a well settled rule in all courts of equity, that the owner of land who stands by and sees another sell it, without making known his claim, is forever estopped from setting up his title against an innocent purchaser. In strict analogy to this rule, it is also a familiar principle, that one who knowingly and silently permits another to expend money upon land, under a mistaken impression that he has title, will not be permitted to set up his right.—*Godeffroy v. Caldwell*, 2 Cal. 489, 56 Am. Dec. 360.

Party making express declaration will be estopped to deny its truth, where it was not confidential, but general, and has been acted upon by others, irrespective of his intentions in making it.—*Mitchell v. Reed*, 9 Cal. 204, 70 Am. Dec. 647.

One who gives money to agent to bet upon election, in agent's name, is not estopped to deny that the money is the agent's when it has been attached as such in the hands of one with whom the agent has deposited it, by the agent's creditors.—*Hardy v. Hunt*, 11 Cal. 343, 70 Am. Dec. 787.

Defendant in ejectment is not estopped by his deed, as against plaintiff.

who is an entire stranger thereto.—*Franklin v. Dorland*, 28 Cal. 175, 87 Am. Dec. 111.

The court charged the jury that this was an action in ejectment, and that the recitals in the sheriff's deed did not bind respondents. The giving of said charges held to be prejudicial error.—*First Nat. Bank of Lewiston v. Hays* (Idaho), 61 Pac. 287.

DECLARATIONS AND ADMIS- SIONS, RES GESTAE: Declarations springing out of principal transaction are to be regarded as contemporaneous with it, and are admissible in evidence as part of the *res gestae*, if they tend to explain the principal transaction, and were voluntarily made at a time so near to, although not precisely concurrent with it as to preclude the idea of deliberate design.—*People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49 and note.

RES GESTAE: The declarations and acts of the parties towards each other are admissible as a part of a transaction as showing the relationship sustained between the parties.—*Burns v. Smith*, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653.

While it is true that a party can not be permitted to prove mere declarations in his own favor, he is entitled to prove, in connection with a contract, any declarations made at the time, and characterizing those acts as a part of the *res gestae*.—*Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87.

Party claiming title by adverse possession may give in evidence his acts and declarations, made or done at any time while in possession, for the purpose of showing the character in which he claimed.—*Cannon v. Stockman*, 36 Cal. 535, 95 Am. Dec. 205.

Declarations of agent are inadmissible as part of the *res gestae* against principal, when not made by agent in discharge of his duties as such.—*Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303. Declarations of agent, to be admissible, must form part of the *res gestae*.—1 Cal. 459, 54 Am. Dec. 305. Declarations of an agent are admissible against his principal if the latter has designated the former as a person who could be trusted, and through whom reports would be made, and the declarations are part of a report made by him.—*Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413. An agent, after a transaction has been completed, can not bind his principal by any admission or declaration he may make concerning its character.—*Borland v. Nevada Bank*, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32. If the relation of principal and agent has ceased, and

parties dealing with the agent are notified of it, they can not, in an action against the principal, for goods afterwards delivered to the agent, introduce in evidence the agent's declarations that the agency has been renewed, or that the principal was to pay for the goods.—*Van Dusen v. S. Q. M. Co.* 36 Cal. 571, 95 Am. Dec. 209.

Admissions of fact by counsel in one suit, are not admissible in evidence against the client in another suit. Party to suit is not bound by, or held to admit as true, every statement made by his witnesses during the trial of a cause, because he does not deny or contradict them at the time.—*Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64.

The doctrine of acquiescence does not apply to proceedings on trials, because it is not the right or duty of a party to interrupt the order of proceedings by denials or contradictions, and his silence can not, therefore, under such circumstances, be deemed an admission.—*Id.*

DECLARATIONS BY EMPLOYES: In an action for an injury by a railway accident, declarations of the locomotive engineer in charge of the train, to whose negligence the accident is attributed, made five minutes afterward, are incompetent as evidence.—69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562, and note; *Wilson v. Southern Pacific Company*, 13 Utah, 352, 44 Pac. 1040, 57 Am. St. Rep. 766. But the acts and declarations of a switchman constituting a part of the *res gestae* are admissible, though given to the jury by a third party.—*Id.* In an action by a passenger against a common carrier of passengers, to recover compensation for injuries sustained by the overturning of defendant's sleigh, the declarations of defendant's driver, immediately after the accident, to the effect that the accident occurred through his carelessness, are outside his authority, and are incompetent as evidence.—2 Mont. 517, 25 Am. Rep. 744. Declarations of master of steamboat while sparks are setting fire to grain fields are part of the *res gestae*, and are admissible in evidence to establish the liability of the owners of the steamboat for the damage done by the fire.—9 Cal. 251, 70 Am. Dec. 650.

A declaration of a vice-principal or foreman at the time when a cliff falls upon and injures an employee is a part of the *res gestae* and therefore admissible in an action against his employer by another servant to recover for injuries sustained by such fall.—*Elledge v. National City, Etc. Ry. Co.* 100 Cal. 282, 34 Pac. 720, 38 Am. St. Rep. 290.

Statements of a vendor of property levied on as his, tending to show that the sale was made to defraud creditors,

made before the sale is completed, are evidence against the vendee.—*Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114; *Eppinger v. Scott*, 112 Cal. 369, 44 Pac. 723, 53 Am. St. Rep. 220. Evidence of what a vendor did and said after a sale of chattels is admissible against his vendee, if it is pertinent to the issue as to whether or not the sale had been accompanied by an immediate delivery and followed by an actual and continued change of possession.—*Etchepare v. Aguirre*, 91 Cal. 288, 27 Pac. 668, 25 Am. St. Rep. 180. The declarations of a vendor of personal property, while he remains in possession thereof, though after the sale, as to the character of his possession, are admissible in evidence against his vendee.—*Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200.

Declarations of third persons are inadmissible in evidence, except in those cases where they have a joint interest with the plaintiff or defendant, or where some legal relation exists, and the party offering them must establish the fact and show the time and circumstances under which they were made.—*Kilburn v. Ritchie*, 2 Cal. 145, 56 Am. Dec. 326.

DECLARATIONS: In an action for damages for assault and battery, language of defendant, used at the time of making the assault, is admissible in evidence for the purpose of characterizing the act, as bearing on the question of malice.—*Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98.

PRESUMPTIONS.

LIBEL: Malice in law is conclusively presumed from the publication of a libel imputing to another the commission of a crime, where the publication is not a privileged one.—*Childers v. San Jose Mercury P. & P. Co.* 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

Presumption of death of absent person can not be raised before the end of seven years, unless he is shown to have met with some specific peril before that time.—*Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300 and note.

Presumptions in favor of the legality of a marriage regularly solemnized prevail in an action to annul that marriage over the presumption of the continuance of the life of a former husband who has been absent and unheard of for less than seven years.—*Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756, 52 Am. St. Rep. 180.

The possession of a warehouse receipt, properly endorsed, is of itself presumptive evidence of the ownership of the grain by the person having such possession of such receipt so indorsed.—*Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647.

Possession of deed by grantee named therein, or by one claiming under him, is prima facie evidence of its delivery.—*Ward v. Dougherty*, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151.

Possession of personal property is only prima facie evidence of ownership, and never prevails against the true owner, except with reference to negotiable instruments and whatever comes under the general denomination of currency. With this exception, the effect of possession as evidence of ownership is subordinate to the principles that no one can be divested of his property without his consent, and that no one can transfer a better title than he has himself.—*Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196.

POSSESSION OF NOTE AS EVIDENCE OF NON-PAYMENT: In an action on a note, the production of the note by plaintiff, with no indorsement of any payment on it is sufficient prima facie proof of non-payment.—*Brennan v. Brennan*, 122 Cal. 440, 55 Pac. 124, 68 Am. St. Rep. 46.

A telegram is presumed to have been delivered in the regular course of business to the person to whom it was directed. The fact that the telegram was sent is therefore admissible in evidence, and tends to prove that it was received.—*Eppinger v. Scott*, 112 Cal. 369, 44 Pac. 723, 53 Am. St. Rep. 220.

MARRIAGE, PRESUMPTION OF LEGALITY: The presumption in favor of the legality of a marriage is one of the strongest known to the law.—*Hadley v. Rash*, 21 Mont. 170, 53 Pac. 312, 69 Am. St. Rep. 649.

All property acquired by either spouse during the existence of community is presumed to belong to it, and this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of one or the other; and the burden of proof lies upon the party claiming the property as separate.—*Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 533; *Meyer v. Kinzer*, 12 Cal. 247, 73 Am. Dec. 538.

NEGLIGENCE, PRESUMPTION. If the cause of an injury to person or property is shown to be under the management of defendant, and the accident is such as in the ordinary course of events does not happen if those having the management use proper care, it affords prima facie evidence, in the absence of explanation, that the accident arose from negligence, and no question of contractual relation forms an element in such case.—*Judson v. Giant Powder Co.* 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146.

JUDGMENT AS EVIDENCE, PRESUMPTION: The judgment of a domestic court of general jurisdiction is

conclusively presumed to be correct, and can not be impeached when offered in evidence in another action, unless the record of the judgment shows that the court did not have jurisdiction of the subject matter or of the person of defendant.—*Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491. A decree of probate court directing administrator to pay over money is, in the absence of fraud or collusion, equally conclusive against the sureties on his official bond.—*Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125.

Where surety undertakes that principal shall do specific act as that he will pay a judgment, the judgment against the principal is conclusive against the surety. No notice to the surety is required, as he stipulated without regard to it.—*Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647 and note.

A judgment against a corporation for an alleged corporate indebtedness is conclusive upon it, and of the right of its creditors to subject its property to the satisfaction thereof, and, in the absence of fraud, equally conclusive upon the stockholders, when it is sought to satisfy the judgment out of the assets of the corporation in their hands; and therefore evidence offered by the stockholders, in the action against them, to show that the indebtedness for which the judgment against the corporation was recovered arose upon a contract which was ultra vires, is properly excluded by the court.—*Baines v. Babcock*, 95 Cal. 581, 30 Pac. 776, 29 Am. St. Rep. 158.

Judgments by default are presumed to have been regularly obtained where the record fails to show the contrary.—*Eichhoff v. Eichhoff*, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110.

COMMON LAW is presumed to be the rule of decision in other states, unless the contrary is expressly shown.—*Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318.

The laws of another state are presumed to be the same as our own, and this presumption extends to its statutory as well as to its common law.—*Cavallaro v. Texas & Pacific Ry. Co.* 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94.

FOREIGN LAW MUST BE PLEADED AND PROVED: A foreign law is a matter of fact, which the courts of this country can not be presumed to be acquainted with, or to have judicial knowledge of.—*Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118.

The official copy of a statute duly enrolled and authenticated is conclusive evidence of the law; and the court can

not resort to the journals of the legislature nor to any other extrinsic evidence to ascertain whether the statute was in fact duly enacted.—*State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721.

USURY, WHAT LAW GOVERNS, NOTES SECURED BY MORTGAGE: Notes dated in Washington, and by their terms payable there, are governed by the law of that state as to usury, though the contract was made in Idaho, and the notes are secured by mortgage on property there, in the absence of evidence of a design to evade the usury laws of the latter state.—*Vermont Loan and Trust Co. v. Dygert* (Idaho), 89 Fed. Rep. 123.

NEGLIGENCE, BURDEN OF PROOF: Where plaintiff shows that he has been injured by the breaking of machinery which was under the control and management of the defendant, he makes out a case which entitles him, if not rebutted, to recover from the defendant. The burden is then thrown on the defendant to show that he was not guilty of negligence for which he must be charged.—*Treadwell v. Whittier*, 80 Cal. 575, 22 Pac. 266, 13 Am. St. Rep. 175. Plaintiff need not prove his own ordinary care to avoid injury, in an action against a ferryman for injuries received in driving off from his boat, but proof of plaintiff's want of ordinary care lies on the defendant.—*May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135.

In an action against a railroad company for setting fire to plaintiff's growing grain by means of sparks escaping from its engine, where the proof shows that the result was not probable from the ordinary working of the engine, this establishes prima facie that negligence existed where there is no proof that the result happened from any unexpected or uncontrollable accident; and the matter should be left to the jury for them to determine the question of negligence or no negligence.—*Hull v. Sacramento Valley R. R. Co.* 14 Cal. 287, 73 Am. Dec. 656.

Burden of proof is on party who conveys water into stream above another's dam, where the latter has a water right, and who wishes to divert such water before it reaches the dam, to show that he diverts no more than he conveyed into the stream. He must show clearly to what portion he is entitled.—*Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769.

MINES, KNOWN VEINS, BURDEN OF PROOF: One claiming a quartz lode mining claim within the boundaries of a patented placer claim has the burden of proof to show that the vein upon which his claim is founded

was "known" at the time when application was made for the placer patent.—*Casey v. Thievege*, 19 Mont. 341, 48 Pac. 394, 61 Am. St. Rep. 511.

INSANITY, OPINIONS OF NON-EXPERTS: Intimate acquaintances of a person whose sanity is the subject of investigation and who have been close observers of his conduct, though not competent as experts, when they can instance acts indicating mental derangement, are competent to give their opinions as to the sanity or insanity of such person.—In *re Christensen*, 17 Utah, 412, 53 Pac. 1003, 70 Am. St. Rep. 794; see also *People v. Hubert*, 119 Cal. 283, 51 Pac. 2 and 542, 63 Am. St. Rep. 72 and note.

OPINIONS OF WITNESSES, QUESTION NOT OBJECTIONABLE AS CALLING FOR: A witness who saw the plaintiff on a specified occasion may be asked whether or not he was apparently well. The witness, though not an expert, should be permitted to state the result of his observation as to the state of a person's health or other characteristic or state which manifests itself to the apprehension of a common observer, notwithstanding the statement of the witness involves his opinion or judgment.—*Robinson v. Exempt Fire Co.* 103 Cal. 1, 36 Pac. 955, 42 Am. St. Rep. 93 and note.

Opinion of witness as to state of party's title is not admissible in evidence.—*Winter v. Stock*, 29 Cal. 407, 89 Am. Dec. 57.

Expert evidence should be received with great caution, and rejected by the jurors, the same as the testimony of any other witness, if after due consideration they deem it not well founded in fact. They may use their own knowledge and judgment in matters of hand-writing, and are not legally compelled to follow the opinion of experts.—*Haight v. Vallet*, 89 Cal. 245, 26 Pac. 897, 23 Am. St. Rep. 465 and note.

BOOKS OF ACCOUNT: A memorandum book, containing an entry of but a single transaction is not an account book within the meaning of the law, and is not admissible in evidence, although the entry was made at the time of the transaction and in presence of the parties.—*Ryan v. Dunphy*, 4 Mont. 356, 47 Am. Rep. 355, 5 Pac. 324.

Bank books, vouchers, and statements of account returned by a bank to the bookkeeper of a corporation with which it is doing business *tre prima facie* evidence of the way the accounts stood at the time of the last balance.—*Pauly v. Pauly*, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98. To prove a partnership the partnership books alone are not competent evidence, but in connection with evidence tending to prove the partner-

ship and access to any knowledge of the books, are competent.—*Bryce v. Joynt*, 63 Cal. 375, 49 Am. Rep. 94.

Where deed refers to map duly recorded in the recorder's office for description of the premises conveyed, a map not recorded, but pasted between the leaves of the recorder's book, is not admissible in evidence with the deed to identify the land. Where deed refers to map for description of premises by metes and bounds, no map is receivable in evidence with the deed to identify the land, unless it is the one referred to.—*Caldwell v. Center*, 30 Cal. 539, 83 Am. Dec. 131.

ADMISSION IN EVIDENCE OF UNSTAMPED INSTRUMENTS: Unstamped instruments may be received in evidence in the state courts, notwithstanding an act of congress, wherein it is provided that certain of such instruments shall not be "admitted or used as evidence in any court."—*Duffy v. Hobson*, 40 Cal. 240.

PROOF IN NEGLIGENCE CASES, NEGLIGENCE CAUSING DEATH, COMPETENCY: In an action by a widow, against a railway company, to recover damages for the alleged negligent killing of her husband on a railroad crossing, it is competent for her, when she is called as a witness, to give the names and ages of the children of the deceased, especially where they are all parties to the action. Such testimony would be proper even if they were not parties.—*English v. Southern Pacific Co.* 13 Utah, 407, 45 Pac. 47, 57 Am. St. Rep. 772.

In an action against a common carrier for loss of property caused by an explosion of the boiler evidence is inadmissible to show that the boiler was in good condition and that the conduct of the officers and crew was without fault.—*Agnew v. Steamer Contra Costa*, 27 Cal. 425, 87 Am. Dec. 87.

In an action for injury by a vicious horse, evidence of previous and of subsequent viciousness is competent.—*Kennon v. Gilmer*, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45.

EVIDENCE IN CASES OF FRAUD: To prove actual fraud, evidence should be strong and decisive.—*Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340.

Whether party misrepresenting material fact knew it to be false, or made the assertion without knowing whether it was true or false, is immaterial.—*Alvarez v. Brannan*, 7 Cal. 503, 68 Am. Dec. 274.

Fraudulent intent is made a question of fact in all cases arising under the statute of frauds and fraudulent conveyances.—*Billings v. Billings*, 2 Cal. 107, 56 Am. Dec. 319.

FRAUD, INSURANCE: Evidence of

the destruction of property other than that insured may be received on behalf of the plaintiff, when the insurance company makes the defense that he had burned his own property.—*Menk v. Home Insurance Company*, 76 Cal. 51, 18 Pac. 117, 9 Am. St. Rep. 158.

FRAUD, FORGED DEED: In ejectment to recover land alleged to be held under a forged deed, the jury have the right, in determining the question as to whether the grantor therein executed and acknowledged such deed, to take into consideration the subsequent conduct of such grantor, and whether he ever, after the date of the deed, set up any claim to the property or made any claim of possession upon the parties in possession, paid the taxes or street assessments on the land, or did any act asserting ownership during his lifetime, and subsequent to the date of such deed.—*Haight v. Vallet*, 89 Cal. 245, 26 Pac. 897, 23 Am. St. Rep. 465.

An entry in the family Bible is but a declaration made out of court, and not under the sanction of an oath. It is hearsay evidence, and is not admissible where the person making it is alive and capable of being examined as a witness in the cause. Hence, such an entry is not admissible in a prosecution for rape for the purpose of proving the age of the prosecutrix at the time of the alleged offense.—*People v. Mayne*, 118 Cal. 517, 50 Pac. 654, 62 Am. St. Rep. 256.

PROOF OF CORPORATE EXISTENCE: The general rule is that the existence of a corporation may be proved by producing its character and showing acts or user under it, but this rule has no application to a corporation formed under the provisions of a general statute requiring certain acts to be performed before the corporation can be considered in esse, or its transactions possess any validity.—*Mokelumne Hill Mining Co. v. Woodbury*, 14 Cal. 324, 73 Am. Dec. 658 and note.

EVIDENCE OF SATISFACTION OF EXECUTION: The return of a sheriff, indorsed on an execution placed in his hands for collection, that the execution is satisfied by promissory notes received for the amount due on it, is not evidence of the satisfaction of the judgment on which it was issued, nor can it be admitted in evidence as tending to prove a satisfaction of the same.—*Mitchell v. Hockett*, 25 Cal. 538, 35 Am. Dec. 151.

Judgment for possession of land, and proceedings under it putting plaintiff in possession, are relevant on the question of the plaintiff's possession, and admissible in a subsequent action by him to recover possession of the same land against another person who entered upon the land after such judg-

ment was recovered.—*Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181.

Answer responsive to bill in equity, and denying charges therein, is not evidence for the defendant, though the bill be sustained by one witness only.—*Goodwin v. Hammond*, 13 Cal. 168, 73 Am. Dec. 574.

Evidence of the value of land is not necessarily confined to the very day on which it was sold, but may include other periods before and after such sale.—*Montgomery v. Sayre*, 100 Cal. 182, 34 Pac. 646, 38 Am. St. Rep. 271.

HIGHWAYS ACQUIRED BY USER, EVIDENCE OF WIDTH: It may be inferred that the width of a highway acquired by user extends to the ordinary width of highways in the locality, or, if the highway is enclosed with fences, to include the entire space so enclosed, as such ordinary width, and the fact of such inclosure is, in connection with other evidence, especially circumstances of recognition by the owner of the fee and the public, of definite and fixed limits, pertinent evidence from which width may be inferred.—*Whitesides v. Green*, 13 Utah, 341, 44 Pac. 1032, 57 Am. St. Rep. 740 and note.

RELATION OF LANDLORD AND TENANT is not proved by the mere production of a lease in evidence, but the entry of the lessee under the lease, or a holding by him referable to the lease, must also be proven.—*Caldwell v. Center*, 30 Cal. 539, 89 Am. Dec. 131.

EVIDENCE, MINING: Custom of miners is entitled to great, if not controlling weight. Custom in other mining districts may be admissible under some circumstances, it seems.—*Brown v. '49 and '56 Quartz Mining Co.* 15 Cal. 152, 76 Am. Dec. 468.

Party in possession of small tract of mineral land with demarked limits is, in the absence of any proof that his claim thereto is opposed to the local rules, presumed to be rightly in possession. Extract from or single clause of book of mining rules of district can not be given in evidence without producing the whole of the rules in the book, where it is necessary to a fair understanding of any one part that the whole shall be inspected.—*English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574.

FAULT IN VEIN: The existence of a fault in one vein of ore is not shown by proof that there are other and disconnected faults in another vein, claimed to be a continuity of the vein under consideration, without showing any continuity in the fault.—*Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665.

WATER RIGHT, ABANDONMENT: Evidence is admissible, as tending to show abandonment of water right, of

lapse of time after accomplishment of the particular purpose for which the water was appropriated, and subsequent disposition of the right to the use for a nominal sum.—*Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554.

MINING CLAIMS, PRIORITY OF LOCATION, JUDGMENT AS EVIDENCE: In a suit to determine the right of possession as between two overlapping mining claims, the defendant withdrew its answer in open court, and judgment was entered for plaintiff, reciting the priority of its location. Defendant thereafter abandoned a portion of its claim, including the portion embraced in the judgment. Held, that, in a subsequent action between the same parties in respect to ground not embraced in that judgment, the judgment was not admissible as evidence of priority of location.

SAME, EJECTMENT, EVIDENCE, RECEIVER'S RECEIPT AND REGISTER'S CERTIFICATE: In a suit to determine the right of possession as between two mining claims, defendant withdrew its answer, judgment was rendered against it, and thereafter it abandoned a portion of its location, including the ground in dispute, and amended its application for a patent accordingly. A receiver's receipt and a register's certificate of entry were then issued for the remaining part of the location. Held, that, as this ground was not involved in any controversy, the receiver and register of the land office had authority and jurisdiction to issue these documents, and the same were admissible as evidence of title in a subsequent action for ejectment.—(*Mining Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. 1055, distinguished.)

SAME: The validity of the receipt and certificate, and their effect as evidence of title, were not affected, as against third parties by the fact that the locator, on abandoning a portion of his claim, did not have the government surveyor make a new survey, for which reason the land office suspended the issuance of a patent until an amended official survey was furnished.

SAME, PRIORITY OF LOCATION, HOW PROVED: When, in following the dip of a vein, the owners of two claims come in conflict, priority of right is determined by priority of location; and, where a patent issued to one of the parties is silent as to the date of the location, the same may be proved by testimony aliunde. (In error to Circuit Ct. U. S. for Dist. Idaho.)—*Last Chance Min. Co. v. Tyler Min. Co.* 61 Fed. Rep. 557, 9 C. C. A. 613.

SEDUCTION, CRIMINAL EVIDENCE: In a prosecution for seduction evidence that the prosecutrix had

sexual intercourse with other men is not admissible.—*People v. Kehoe*, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52.

UNLAWFUL COHABITATION, EVIDENCE, TESTIMONY: In the trial of such offense, as well as of kindred offenses of adultery and bigamy, as defined by the laws of the United States proof of the existence of the marriage relation is pertinent; it being a collateral fact which aids in explaining the association of a man and woman, and tends to show whether the association is justified and innocent, or that of unlawful cohabitation.

MARRIAGE, EVIDENCE OF REPUTATION: The general reputation in the community of the existence of the marriage relation is competent as tending to prove such relation, but is not alone sufficient to establish it. (At law. Unlawful cohabitation.)—*United States v. Higginson*, 46 Fed. Rep. 750.

CRIMINAL LAW, EVIDENCE OF CO-CONSPIRATORS, FOUNDATION FOR ADMISSION: Evidence that a defendant, charged with having entered into a conspiracy with other defendants to make and utter counterfeit coins, was a relative of others of the defendants; that he resided with one of them for six weeks, during which time the counterfeit coins were there made; that he wrote the letter ordering the machine with which they were made; and that, after the arrest of one of the defendants, he wrote offering to assist in procuring bail, is sufficient as connecting defendant with the conspiracy to authorize the admission against him of statements of his co-conspirators.

SAME, ORDER OF PROOF: The order of proof rests in the sound discretion of the court, and it is not bound to exclude evidence of declarations of co-conspirators against a defendant until after the prosecution has proved his connection with the offense charged.

SAME, EVIDENCE, HEARSAY: While it is competent to ask a witness for the prosecution if he is to receive a reward in case of the defendant's conviction, or to prove such fact to show his interest, it is not competent to prove a statement made by him to that effect unless for the purpose of impeachment, and after he has been interrogated in regard to such statement.

SAME, DEMONSTRATIVE EVIDENCE: In a prosecution for counterfeiting, permitting a plating machine taken from defendants to be operated in the presence of the jury by an expert, to demonstrate that it could be used for plating coins such as defendants were charged with having made and uttered, was no error. (In error to Circuit Ct. U. S. for Dist. Idaho.)—*Taylor v. United States*, 89 Pac. Rep. 354.

CRIMINAL EVIDENCE: Dying declarations are not admissible in evidence, if it appears that the declarant had the slightest hope of recovery, although he dies within an hour afterward.—*People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30.

Evidence of particular acts of intercourse by prosecutrix for rape with others than the defendant is admissible for the defense, though the prosecutrix was not asked concerning them, for the purpose, not so much of impeaching her, as of rebutting the presumption of want of assent, where she is the only witness for the prosecution.—*People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506.

WAIVER OF RIGHT TO BE CONFRONTED WITH WITNESSES: Where the public prosecutor moved to postpone the trial of a person indicted for a misdemeanor, on account of the absence of witnesses, and the counsel for the accused offered in open court to admit that the witnesses, if present, would testify to the facts stated in the moving affidavit, and the application was denied. Held, that the prisoner waived his constitutional right to be confronted with the witnesses, and that the affidavit was competent evidence for the prosecution.—*United States v. Sacramento*, 2 Mont. 339, 25 Am. Rep. 742.

JUDICIAL KNOWLEDGE.

Section 4403. Specification of Certain Facts Assumed True: Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of legal expressions;
2. Whatever is established by law;
3. Public and private official acts of the legislative, executive and judicial departments of this state and of the United States.
4. The seals of all the courts of this state and of the United States;
5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive and judicial departments of this state and of the United States;
6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States;
7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;
8. The laws of nature, the measure of time, and the geographical divisions and political history of the world. In all these cases the court may resort for its aid to appropriate books or documents of reference.

Whenever the knowledge of the court is by this section made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.

1887 R. S. Sec. 5950, and last part of Sec. 5951.

Courts will take official cognizance of their own officers.—*People v. Butler*, 1 Idaho, 231.

The supreme court can not take judicial notice of the adjournment of the terms of the district courts.—*Baker v. Knott* (Idaho), 35 Pac. 172.

ORDINANCES: Courts will not take judicial knowledge of city ordinances: they must be proved by the records, or by certified copies thereof.—*People v. Buchanan*, 1 Idaho, 681.

Judicial notice will be taken, when

necessary for the administration of justice, of all previous and undisputed proceedings in the case appearing therein of record, certified and authenticated as required by law.—*Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57.

Judge is presumed to know history of the country in which he presides, and the leading traits entering into that history.—*Conger v. Weaver*, 6 Cal. 548, 65 Am. Dec. 528. Courts are bound to take notice of political and social condition of the country which they judicially rule. Rule applied to water and

mining rights on public lands.—*Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113.

Courts will take judicial notice of the source and place where a river flowing through the state empties; that it is navigable and affords a natural and free highway for the passage of fish.—*People v. Truckee Lumber Co.* 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183. That lands described according to the government survey lie within certain county.—*Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100. Judicial notice may be taken of the boundaries of a city as described in the act of its incorporation, and also of the fact that a river flows through such city from north to south, and near its

eastern limits.—*De Baker v. Southern Cal. Ry. Co.* 106, Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237.

CORPORATE AGENCY: Courts will take judicial notice that the superintendent of a railroad company has authority to receive or refuse cord wood.—*Sacalaris v. Eureka and Palisade R. Co.* 18 Nev. 155, 1 Pac. 835, 51 Am. Rep. 737.

Courts will understand words in general use in the same sense in which they are usually understood by masses of men, and no allegation or proof of such meaning is necessary. Word "sack" discussed.—*Edwards v. San Jose Printing Society*, 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

WITNESSES.

Section 4404. Persons Capable of Perception may be Witnesses: All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceedings are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

1887 R. S. Sec. 5956.

See *State v. Larkins* (Idaho), 47 Pac. 945.

This section, allowing party to action

to be examined as witness on his own behalf construed.—*Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64.

Section 4405. Persons who Cannot Testify: The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination;

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly;

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or an administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person.

1887 R. S. Sec. 5957.

Rev. St. Idaho, Section 5957, Sub. 3, does not apply to an action brought to establish a trust.—*Nasholds v. McDonell* (Idaho), 55 Pac. 894.

Under the provisions of Sub-division 3, Sec. 5957, Rev. St. in an action against an administrator to establish

a resulting trust in land, the plaintiff in such action is disqualified from being a witness as to matters of fact occurring before the death of such deceased person.—*Nashold v. McDonell* (Idaho), 55 Pac. 894, overruled on that point; *Rice v. Rigley* (Idaho), 61 Pac. 290.

The term "claim or demand" as used in said Sec. 5957, embraces all rights of actions for the establishment of a trust in land, as well as claims or demands for debts or damages against the estate of a deceased person.—*Rice v. Rigley* (Idaho), 61 Pac. 290.

In an action by a widow against the administrator of her husband's estate in which she claims title to land by virtue of a conveyance alleged to have been made to her by her husband, she is a competent witness to testify that the deed under which she claims was delivered to her by her husband in his life time. Such action is not "upon a claim or demand against the deceased" within the meaning of a statute making parties in interest, or the assignors of parties to such action, incompetent as witnesses to testify to any matter of fact occurring before the death of such deceased.—*Poulson v. Stanley*, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73.

Widow who is party plaintiff, and derives her claim of title to property in controversy through the will of her deceased husband is incompetent to testify as to matter transpiring before his death, being a "representative of a deceased person" within the meaning of this section.—*Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644. The defendant in a suit by the surviving member of a partnership to foreclose a chattel mortgage can not be permitted to testify as to a conversation with a deceased member of that partnership, in which he agreed to take certain property in satisfaction of the mortgage.—*Gage v.*

Phillips, 21 Nev. 150, 26 Pac. 60, 37 Am. St. Rep. 494 and note.

The word "representative," as used in this section, applies to the executor or administrator of the estate of a deceased person, and also to the person or party who has succeeded to the right of the deceased, whether by purchase or descent, or operation of law.—*Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157.

statute prohibiting a party to an action against an executor or administrator from being a witness as to any fact occurring before the death of deceased, does not prevent the plaintiff in such an action from testifying to the correctness of books of account which had been wholly kept by him, preparatory to their introduction in evidence, and such books can not be proved by a third person who had no personal knowledge of their correctness.—*Roche v. Ware*, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539.

ESTATE OF DECEDENTS, STIPULATION FOR DEPOSITIONS: A stipulation that depositions are to be taken subject to objection as to the propriety, relevancy, and materiality of the interrogatories contained therein, is not a waiver of an objection thereto on the ground that the testimony given is of facts occurring prior to the death of the defendant, to whose estate it relates, where the statute precludes witnesses from testifying to any fact occurring before the death of such decedent.—*Fox v. Tay*, 89 Cal. 339, 26 Pac. 897, 23 Am. St. Rep. 474.

Section 4406. Testimony Violating Confidential Relations Prohibited: There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other;

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment;

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs;

4. A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient;

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

1887 R. S. Sec. 5958.

Witness, election contest, privileged: Sec. 3808.

ACTION FOR CONSPIRACY, TESTIMONY OF WIFE, COMPETENCY: In an action for conspiracy to defraud against two defendants under the statute which declares "a husband can not be examined for or against his wife, without her consent, nor a wife for or against her husband without his consent." Held, that the wife of one of the defendants might be examined as a witness on the part of plaintiff, under instructions on the part of the court to jury, if asked, that her testimony was only to be considered as against the other defendant, than her husband.—*Shields v. Ruddy*, 2 Idaho, 884, 28 Pac. 405.

Confidential communications between attorney and client are privileged, and neither client nor his attorney can be compelled to reveal them; but such communications being overheard by a third party, either by accident or design, such third person can be compelled, to testify to them.—*Perry v. State* (Idaho), 38 Pac. 655.

The acts of both client and his attorney, when relevant to the issue, may be fully proven.—*Perry v. State* (Idaho), 38 Pac. 655.

ATTORNEYS, WITNESS: Attorneys should offer themselves as witness for their clients only in case of supreme necessity.—*Sebree v. Smith*, 2 Idaho, 329, 16 Pac. 915.

HUSBAND AND WIFE, PRIVILEGED COMMUNICATION: The delivery of a deed from a husband to his wife is not a privileged communication.—*Poulson v. Stanley*, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73.

When a defendant in a criminal case has offered himself as a witness in his own behalf, but has not testified in chief to any communications between his wife and himself, he can not, without his consent, be cross-examined as to any such communications, although, since the time they are claimed to have been made the husband and wife have been divorced.—*People v. Mullings*, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223.

The wife of an insane husband can not testify for him, if the statute de-

clares that a wife can not testify for or against her husband without his consent. Being insane, he can not grant such consent.—*Falk v. Wittram*, 120 Cal. 479, 52 Pac. 707, 65 Am. St. Rep. 184.

PRIVILEGED COMMUNICATIONS: If an attorney is acting as agent for both parties to a negotiation, or if they are negotiating with each other in the presence of the attorney of one of them, the communications made in the presence of all of the parties are not privileged as between themselves, and the attorney may be compelled by either to testify thereto, in a suit between them growing out of such negotiations.—*Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 366, 54 Am. St. Rep. 365.

Confidential communications made by client to attorney are privileged, so far as they relate to the business which the attorney is employed to transact; and the attorney can not be compelled to disclose them. But this rule does not apply to any facts within the attorney's knowledge, or information acquired by him in any other way than by such confidential communications of the client. While an attorney and client are transacting business, any statements made by the client to others present at the time, or by other persons to each other or by the attorney to the client, are not privileged, and the attorney is bound to disclose them the same as any other witness.—*Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114.

Attorney is not permitted to disclose confidential communications of client; but if he acquires information apart from or independent of such source, he is not protected from disclosing it.—*Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543.

When disclosure of privileged communications become necessary to the protection of the attorney's rights, in a suit between him and his client, he is released from the obligations of secrecy which are placed upon him. He should not, however, disclose more than is necessary for his protection.—*Mitchell v. Bromberger*, 2 Nev. 345, 90 Am. Dec. 550.

Section 4407. Judge or Juror may be Witness: The judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the court to order the trial to be postponed or suspended, and to take place before another judge or jury.

1887 R. S. Sec. 5959.

Section 4408. When an Interpreter to be Sworn: When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpoena. Any person so summoned who fails to attend at the time and place named in the summons, is guilty of a contempt.

1887 R. S. Sec. 5960.

PUBLIC WRITINGS. GENERAL PROVISIONS. DEFINITIONS AND CLASSIFICATIONS.

Section 4409. Citizens Entitled to Inspect Public Writing: Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.

1887 R. S. Sec. 5965.

Section 4410. Public Officers Must Give Copies: Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing.

1887 R. S. Sec. 5966.

Section 4411. Official Certificates, Contents of: Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance, that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be a clerk of a court having a seal, under the seal of such court.

1887 R. S. Sec. 5982.

Section 4412. Statutes Defined: Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations.

1887 R. S. Sec. 5967.

Section 4413. Kinds of Public Writings: Public writings are divided into four classes:

1. Laws;
2. Judicial records;
3. Other official documents;
4. Public records kept in this state, of private writings.

1887 R. S. Sec. 5968.

PUBLIC WRITINGS, PROOF OF LAWS.

Section 4414. Authorized Publication of Statutory Law Presumed Correct: Books printed or published under the authority of a state, territory, or foreign country, and purporting to contain the statutes, code, or other written law of such state, territory, or country, or proved to be commonly admitted in the tribunals of such state, territory, or country as evidence of the written law thereof, are admissible in this state as evidence of such law.

1887 R. S. Sec. 5969.

Section 4415. Certified Copy of Law, or Public Writing: A copy of the written law, or other public writing of any state, territory, or country, attested by the certificate of the officer having charge of the original, under the public seal of the state, territory, or country, is admissible as evidence of such law or writing.

1887 R. S. Sec. 5970.

Section 4416. Other Evidence of Laws of Other States: The oral testimony of witnesses skilled therein, is admissible as evidence of the unwritten law of another state, territory, or foreign country, as are also printed and published books of reports of the decisions of the courts of such state, territory or country, commonly admitted in such courts.

1887 R. S. Sec. 5971.

Section 4417. Recitals in Statutes, how Far Evidence: The recitals in a public statute are conclusive evidence of the facts recited for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further.

1887 R. S. Sec. 5972.

PUBLIC WRITINGS. JUDICIAL RECORD.

Section 4418. Judicial Record Defined: A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding.

1887 R. S. Sec. 5973.

Judgment roll, what constitutes: Sec.

3509.

Execution book, real estate levies, etc., entries admissible when original lost, etc.: Sec. 3533.

Section 4419. Record, how Authenticated as Evidence: A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody

thereof. That of another state or territory may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

1887 R. S. Sec. 5974.

Seals when necessary for authentication: Sec. 3026.

Public writings docket entries of justices of the peace, duly certified, prima facie evidence: Sec. 3675.

When service against non-resident is by publication proof by plaintiff or agent of non-payment is essential: Sec. 3501.

In an action upon an attachment bond where the affidavit in such proceedings is defective or false, such affidavit in the original cause may be introduced in evidence by the defendant for the purpose of showing such defect or falsity and to establish the fact that the court had no jurisdiction to issue the attachment.—*Murphy v. Montandon*, 2 Idaho, 1048, 29 Pac. 851.

JURISDICTION, EXTRINSIC EVIDENCE IN SUPPORT OF: Facts nec-

essary to show that a court or board of limited or special jurisdiction has acted within its jurisdiction may be proved by other competent evidence in the absence of a statute requiring such facts to appear in the minutes or other record of its proceedings.—*In re Williams*, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163.

Where county clerk acts as ex-officio clerk of different courts, process or proceedings of such courts issued or attested by him are not invalid because of the absence of the designation of the particular court of which he acts as ex-officio clerk, provided that fact otherwise sufficiently appears upon the face of the papers; and the affixing of a seal inscribed with the name of the court is sufficient for this purpose.—*Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108.

Section 4420. Record of Foreign Country, how Authenticated:

A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk or seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge, or presiding magistrate, that the person making the attestation is the clerk of the court or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge, or presiding magistrate, must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country.

1887 R. S. Sec. 5975.

Certificate, requirements of: Sec. 4411.

A judgment record of another state may be collaterally impeached by extrinsic evidence showing that the court

pronouncing the judgment did not have jurisdiction, though the record recites the existence of the jurisdiction sought to be disproved.—*In re James*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60.

Section 4421. Oral Evidence of a Foreign Record:

A copy of the judicial record of a foreign country is also admissible in evidence, upon proof:

1. That the copy offered has been compared by the witness with the original and is an exact transcript of the whole of it;
2. That such original was in the custody of the clerk of the court, or other legal keeper of the same; and,
3. That the copy is duly attested by a seal which is proved to be the seal of the court where the records remain, if it be the record of a court, or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original,

1887 R. S. Sec. 5976.

Section 4422. Justices' Judgment how Proved: A transcript from the record or docket of a justice of the peace of another state or territory, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

1887 R. S. Sec. 5980.

Section 4423. Authentication of Justice's Judgment: There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice resided at the time of rendering the judgment, under the seal of the county, or the seal of the court of common pleas, or county court, or court of general jurisdiction thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings, and jurisdiction may also be proved by the justice himself, on the production of his docket, or by a copy of the judgment, and his oral examination as a witness.

1887 R. S. Sec. 5981.

PUBLIC WRITINGS. OTHER OFFICIAL RECORDS.

Section 4424. Manner of Proving Other Official Documents: Other official documents may be proved as follows:

1. Acts of the executive of the State, by the records; and of the United States, by the records of the departments of the United States, certified by the heads of those departments respectively. They may also be proved by public documents, printed by the order of the legislature or congress, or either house thereof;

2. The proceedings of the legislature of this State, or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk, or printed by their order;

3. The acts of the executive, or the proceedings of the legislature of another State or Territory in the same manner;

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof, in some public act of the executive of the United States;

5. Acts of a municipal corporation of this State or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book, published by the authority of such corporation;

6. Documents of any other class in this State, by the original, or by a copy, certified by the legal keeper thereof;

7. Documents of any other class in another State, or Territory,

by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, district, superior, or county court, or mayor of a city of such State or Territory, that the copy is duly certified by the officer having the legal custody of the original;

8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with a certificate under seal, of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody of the original;

9. Documents in the departments of the United States government, by the certificate of the legal custodian thereof.

1887 R. S. Sec. 5977.

Certificate: Sec. 4411.

Section 4425. Entries in Official Books Prima Facie Evidence: Entries in public or other official books or records, made in the performance of his duty by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.

1887 R. S. Sec. 5979.

Section 4426. Certificates of Purchase, Evidence of Ownership: A certificate of purchase, or of location, of any lands in this State, issued or made in pursuance of any law of the United States, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

1887 R. S. Sec. 5983.

Section 4427. Entries Made by Officers Prima Facie Evidence: An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

1887 R. S. Sec. 5984.

Entry of transfer of mining claim in book of mining records is not admissible as primary evidence of such transfer, there appearing no mining regulation making it such evidence. But

such entry may be admissible to show compliance with the rules of the mining district, and of the rule requiring such transfer to be recorded.—*Atwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567.

Section 4428. Public Record of Private Writing, Evidence: A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

1887 R. S. Sec. 5978.

Certificate, requirements of: Sec. 4411.

Letters of administration, etc., transcript probate minutes in lieu of: Sec. 4094.

Section 4429. Authorized Abstracts of Title, Prima

Facie Evidence: An abstract of title to real estate prepared and certified to by an abstractor duly qualified under the provisions of Sections 260 and 261 of the Political Code, and authenticated with certificate of the probate judge, as provided in Section 262, shall be received in all courts as prima facie evidence of the existence of the record of deeds, mortgages, and other instruments, conveyances or liens, affecting the real estate mentioned in such abstract, and that said record is as described in said abstract of title.

1899, 5th Ses. p. 315, Sec. 3, rewritten by Commission.

Section 4430. Must Furnish Opposing Attorney Copy of Abstract: Any party to a civil action who may desire to use in evidence at the trial thereof any abstract of title to real estate as herein provided, shall furnish to the opposing party or his attorneys a copy of such abstract at least three days before the trial of said action, and in case such real estate be not in the county where such trial is to take place, then such copy shall be furnished to the opposing party or his attorney, to allow a sufficient number of days such opposing party to proceed by the usual route of travel, to the county seat of the county where such real estate may be situated and return to the place of trial in addition to the three days for preparation above provided for.

1899, 5th Ses. p. 315, Sec. 4.

DEFINITION.

Section 4431. Public and Private Seals, Scroll or Sign: A public seal in this State is a stamp or impression made by a public officer with an instrument provided by law to attest the execution of an official or public document, upon the paper or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign made in another State or Territory or foreign country, and there recognized as a seal, must be so regarded in this State.

1887 R. S. Sec. 5989.

PRIVATE WRITINGS, PRODUCTION AND PROOF OF.

Section 4432. Possession of Adverse Party: If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.

1887 R. S. Sec. 5991.

Contents of writings, how proved:
Sec. 4440.

Section 4433. Writings Called for and Inspected may be Withheld: Though a writing called for by one party is

produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case.

1887 R. S. Sec. 5992.

Writings proved by witness, read to jury, when: Sec. 4488.

Section 4434. Writing, how may be Proved: Any writing may be proved either:

1. By any one who saw the writing executed; or,
2. By evidence of the genuineness of the handwriting of the maker; or,
3. By a subscribing witness.

1887 R. S. Sec. 5993.

Proving will on contest: Sec. 4010.

Proof of the indorsement of a promissory note is necessary to entitle it to

admission in evidence, unless waived when the indorsement is offered in evidence.—*Poorman v. Mills & Co.* 35 Cal. 118, 95 Am. Dec. 90.

Section 4435. Proof Other than by Subscribing Witnesses: If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence.

1887 R. S. Sec. 5994.

Section 4436. When Evidence on Execution not Necessary: Where, however, evidence is given that the party against whom the writing is offered, has at any time admitted its execution, no other evidence of the execution need be given, when the instrument is one produced from the custody of the adverse party, and has been acted upon by him as genuine.

1887 R. S. Sec. 5995.

PRIVATE WRITINGS, ADMISSIBILITY IN CERTAIN CASES.

Section 4437. Entries of Decedents, Evidence in Specified Cases: The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:

1. When the entry was made against the interests of the person making it;
2. When it was made in a professional capacity, and in the ordinary course of professional conduct;
3. When it was made in the performance of a duty specially enjoined by law.

1887 R. S. Sec. 5996.

Section 4438. Private Writings Acknowledged and Certified: Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgment or proof is prima facie evidence of the execution of the writing, in the same manner as if it were a conveyance of real property.

1887 R. S. Sec. 5997.

Olographic wills may be proved in

same manner as other private writing.

Sec. 4005.

Section 4439. Copies of Record Admissible Without Further Proof: Every instrument conveying or affecting real property, acknowledged or proved, and certified, as provided by law, may, together with the certificate of acknowledgment or proof, be read in evidence, in an action or proceeding, without further proof, and a certified copy of the record, of such conveyance or instrument thus acknowledged or proved, may also be read in evidence, with the like effect as the original, on proof, by affidavit, or otherwise, that the original is not in the possession or under the control of the party producing the certified copy.

1887 R. S. Sec. 5998.

ACKNOWLEDGMENT OF DEED BY TELEPHONE: In the absence of fraud, accident, or mistake, the certificate of the notary, in due form, is conclusive of the material facts therein stated.—*Banning v. Banning*, 80 Cal. 271, 22 Pac. 210, 13 Am. St. Rep. 156.

Deed is admissible in evidence as deed of corporation, where it purports to be such, is signed by the trustees as trustees, and has the corporate seal attached. It is in itself prima facie evidence of the regular and duly authorized execution of the same, and it devolves upon the party contesting its validity to overthrow this presumption.—*Miners' Ditch Co. v. Dellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

ADMISSIBILITY OF A DEED REFERRED TO IN ANOTHER DEED IN EVIDENCE: If a deed of land which does not contain a description of the land conveyed, but in the body of it refers to another deed for such description, is properly admitted in evidence, then the deed to which it refers is entitled to be received in evidence, for the purpose of showing a description of the land conveyed, without any proof of its genuineness, or that there was any such person as the one purporting to execute it, or that he had any title to the land described therein.—*Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103.

Deed of corporation without corporate seal, executed by trustees of the corporation, is not admissible in evidence without first showing the authority of the trustees to execute it. The recital of the authority in the deed is no evidence of its existence.—*Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

Authority of deputy to execute sher-

iff's deed must be shown to entitle the deed to be admitted in evidence.—*Cloud v. El Dorado County*, 12 Cal. 128, 73 Am. Dec. 526.

Recitals in a deed estop all parties and privies, as a general rule, but this rule does not extend to more description or non-essential averments.—*Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498.

EVIDENCE TO SHOW THAT A DEED WAS INTENDED AS A MORTGAGE: Where a deed purports to be absolute, a trial court is justified in requiring clear proof that it was intended as a mortgage.—*Falk v. Wittram*, 120 Cal. 479, 52 Pac. 707, 65 Am. St. Rep. 184; *Mahoney v. Bostwick*, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175 and note.

A tax deed creates no presumption that the facts upon which it is based, or which are recited therein, had any existence, in the absence of a statute providing the effect which shall be given it in evidence.—*Miller v. Miller*, 96 Cal. 376, 31 Pac. 247, 31 Am. St. Rep. 229 and note; *Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738.

Delivery of deed, as to evidence inadmissible to disprove.—*Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186.

DEEDS, DECLARATIONS AS EVIDENCE: If a father induces his daughter to convey land to her mother on condition that her parents will convey other land to her husband after her death, to which they will succeed as her heirs, her declarations made at the time of such inducement are admissible in an action by her husband, after her death, to compel such conveyance from her parents, although the mother was not present when the promise was made.—*Simons v. Bedell*, 122 Cal. 341, 55 Pac. 3, 68 Am. St. Rep. 35.

Section 4440. Contents of Writing, how Proved: There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases;

I. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made;

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice;

3. When the original is a record or other document in the custody of a public officer;

4. When the original has been recorded, and a certified copy of the record is made evidence by this Code or other statutes;

5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole. In cases mentioned in subdivisions three and four, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents.

1887 R. S. Sec. 5999.

Notice to adverse parties to produce writing: Sec. 4432.

Contents of lost will, two witnesses necessary: Sec. 4025.

RECORD EVIDENCE: Where there is record evidence which can be obtained of any fact material to the issues, such evidence can only be received because it is of a higher character than parol testimony. To admit evidence of a secondary character, where higher evidence of the fact is attainable, against the objections of the opposite party, is erroneous.—*Ralston v. Plowman*, 1 Idaho, 595.

DESCRIPTION OF NOTICE OF LEVY: Parol evidence is not admissible to cure a description in a notice of levy and attachment, when the description is vague and uncertain.—*First Nat. Bank of Hailey v. Sonnelitner* (Idaho), 51 Pac. 993.

TO ESTABLISH TRUST, PAROL EVIDENCE: One who takes the title to real estate purchased with funds of another, and for the benefit of the latter, holds as trustee, and parol evidence is admissible to establish such trust.—*Branstetter v. Mann* (Idaho), 57 Pac. 433.

ACTION TREASURER'S BOND, BANKER'S LEDGER: In an action on treasurer's bond, the plaintiff was permitted, over the objection of defendants, to introduce the ledger of a banking company, and to read in evidence certain entries therefrom; there being no proof as to who made the entries or when they were made, or that the treasurer had any knowledge of, or ever consented to, such entries. Held, error. Rehearing denied.—*Bingham County v. Woodin* (Idaho), 55 Pac. 662.

BOOKS OF CORPORATION, TRANSFER OF STOCK: The books of a corporation contain the only proper evidence to show the transfer of stock between parties to such transfer, in a

suit by creditors of the corporation, and evidence of the parties to the transfer can not be received.—*Aulbach v. Dahler* (Idaho), 43 Pac. 322.

COPIES OF BOOKS OF ACCOUNT, COMPETENCY: A copy of the original entries in an account book is admissible in evidence in an action on an account where it appears that the book of original entries has become lost.—*Mills v. Glennon*, 2 Idaho, 95, 6 Pac. 116.

Written contract is considered definite agreement of parties, and parol conversations and understandings are all merged in it.—*Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529.

Where contract is free from ambiguity on its face, parol evidence is not admissible to vary its terms or to alter the character of the liability which it creates.—*Buiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618. But where a latent ambiguity arises parol evidence is admissible to interpret the contract.—*Brown v. Markland*, 16 Utah, 360, 52 Pac. 597, 67 Am. St. Rep. 629.

CONTRACT REDUCED TO WRITING, PAROL EVIDENCE INADMISSIBLE TO VARY TERMS OF: A contract which has been reduced to writing, and is not alleged to be tainted with fraud or executed by mistake, can not be varied by parol evidence of the contents of lost letters which passed between the parties before it was executed.—*Gage v. Phillips*, 21 Nev. 150, 26 Pac. 60, 37 Am. St. Rep. 494.

Whether or not a writing, upon its face, is a complete expression of the agreement of the parties is a question of law. Where a writing, upon its face, imports to be a complete expression of the whole agreement, and contains thereon all that is necessary to constitute a contract, it is presumed that the parties have introduced into it every material item and term, and parol evidence is not admissible to add another term to the agreement, although the

writing contains nothing on the particular item to which the parol evidence is directed.

WHEN "ETC.," IS SURPLUSAGE: If the abbreviation "etc.," used in a contract, is meaningless, and does not render the writing incomplete as a contract of sale, nor justify the conclusion that it was not intended by the parties as a memorial of all the terms of their contract, nor in any manner affect the legal construction of the contract, it will be disregarded as surplusage.

SALE BY SAMPLE: Where, in a suit on a contract of sale which appears complete in itself, and contains nothing to indicate that a sample was used or referred to in making it, the court finds that the goods delivered were of the kind and class named therein, but fails to find that they were not merchantable, nor equal in quality to those called for in the contract, the admission of parol evidence to show a sale by sample, and that the goods delivered did not correspond therewith, and judgment was for defendant, is reversible error.—*Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469 and note.

Evidence as to the meaning of abbreviation in contract and as to printed matter, therein, when admissible.—*Berry v. Kowalsky*, 95 Cal. 134, 30 Pac. 202, 29 Am. St. Rep. 101.

Parol evidence is admissible to show that a note was given without consideration and to protect maker against his creditors.—12 Nev. 105, 28 Am. Rep. 781.

A promissory note, reading, "We promise," and signed, "Pioneer Mining Company, John E. Mason, Supt.," and not sealed, may be shown by parol to have been understood by the payee to be the note of the company alone, and to have been for a consideration passing to the company; in which case the superintendent is not bound.—*Bean v. Pioneer Mining Co.* 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106. Party signing promissory note with addition of word "trustee" to his name is personally liable; nor is evidence admissible to show that at the time the note was made there was a parol agreement that he should not be personally liable, but the note was to be paid out of a trust fund.—*Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529. In an action by an endorsee before maturity on a promissory note given for goods sold, the defendant offered to show that at the time of its execution, the parties, not knowing the exact quantity of the goods, agreed that if they fell short of the estimated quantity, a corresponding deduction should be made from the note, and that the

goods did fall short of the estimated quantity; and that the plaintiff had notice of these facts before the indorsement. Held, admissible.—*Braiy v. Henry*, 71 Cal. 481, 11 Pac. 385 and 12 Pac. 623, 60 Am. Rep. 543.

A certificate of the acknowledgement of a deed is not conclusive evidence of the fact of such acknowledgment, but may be impeached by parol evidence that the person therein named never appeared before the officer certifying the acknowledgment.—*Le Mesnager v. Hamilton*, 101 Cal. 532, 35 Pac. 1054, 40 Am. St. Rep. 81. The facts stated in a notary's certificate of acknowledgment to a receipt are only prima facie presumed to be true, and can be overcome by any evidence, direct or indirect.—*Moore v. Hopkins*, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248.

Extrinsic evidence is not admissible to show that different direction than that described in a deed was intended, where the language is not repugnant nor ambiguous.—*Fratt v. Woodland*, 32 Cal. 219, 91 Am. Dec. 573.

Parol agreement that a mortgage shall be held in trust by the mortgagee, in part for his own benefit and in part for the benefit of another, is valid, a mortgage conveying no estate in, but creating a mere lien upon, the land; and evidence of such agreement does not vary the terms of the written instrument.—*Tapia v. Demartina*, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288.

Parol evidence is admissible to show that conveyance or assignment absolute on its face was intended as a mortgage.—*Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481.

Parol evidence is admissible to prove that a conveyance made by a judgment debtor, after the sale of his property under execution, was for the purpose of enabling the grantee to redeem it from such sale, and that the latter agreed to hold the premises, to make such advances as should be required to pay taxes and assessments, and upon the sale thereof to repay such advances with interest, and pay the residue of the proceeds of the sale to the judgment debtor. A recital in a deed that the consideration has been paid is not conclusive.—*Byers v. Locke*, 93 Cal. 493, 29 Pac. 119, 27 Am. St. Rep. 212.

Deed absolute on its face can not by parol evidence be shown to have been given in trust for the benefit of the grantor in the absence of fraud, accident, or mistake, or a fiduciary relation between the parties.—*Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 12 Am. St. Rep. 162.

Resulting trusts are provable by parol, notwithstanding the statute of

frauds.—*Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498.

Constructive trusts in real property are excepted from operation of statute of frauds, and may be established by parol.—*Brisson v. Brisson*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; *Bowler v. Curler*, 21 Nev. 158, 26 Pac. 226, 37 Am. St. Rep. 501.

Recital of consideration in a deed can not be disproved for the purpose of raising a trust or defeating the operation of the instrument, in the absence of fraud or mistake.—*Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 12 Am. St. Rep. 162.

An apparent co-maker of a note may be proved, by parol evidence, to be a surety.—*Gillett v. Taylor*, 14 Utah, 190, 46 Pac. 1099, 60 Am. St. Rep. 890.

EVIDENCE OF MANNER OF SERVICE OF SUMMONS: In an action on a justice's judgment brought in the district court, parol evidence is not admissible to show the manner of service of summons in the justice's court and that such service was made in compliance with the statute.—*Sanfors v. Edwards*,

19 Mont. 56, 47 Pac. 212, 61 Am. St. Rep. 482.

Recitals in sheriff's deeds are conclusive as between the parties to them and those claiming under them, and can not be contradicted by parol evidence showing that the land was sold under a different judgment and execution than those recited in the deed.—*Zabriskie v. Meade*, 2 Nev. 285, 90 Am. Dec. 542; see also *Donahue v. McNulty*, 24 Cal. 411, 85 Am. Dec. 78.

It is not competent to impeach enrolled act of legislature by parol evidence.—*Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93.

Where note sued on is in possession of plaintiff, he must produce it, as it is the best evidence; but if it is in the defendant's possession, and he fails to produce it, the plaintiff may prove its execution and contents by secondary evidence. He may also prove that the note sued on was in the possession of defendant at the time of the trial, without alleging that fact in his complaint.—*McClusky v. Gerhauser*, 2 Nev. 47, 90 Am. Dec. 512.

Section 4441. Writing Altered, who to Explain:

The party producing a writing as genuine which has been altered, or appears to have been altered after its execution in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that he may give the writing in evidence, but not otherwise.

1887 R. S. Sec. 6030.

PROMISSORY NOTE, ALTERATION SHOWING: A party offering in evidence a promissory note showing upon its face that it has been altered, is required, before the same can be received to show that such alteration was made before it came to his hands.—*Mulkey v. Long* (Idaho), 47 Pac. 949 (cases cited.)

SAME, WHEN VOID, SURETY: A promissory note altered in a material particular is rendered void, as to one who signs it as a surety merely, where such alteration was made without the knowledge or consent of such surety; and a mere verbal promise, without consideration, will not sustain an action

against such surety for the amount of such note.—*Mulkey v. Long* (Idaho), 47 Pac. 949 (cases cited.)

ALTERATION APPEARING ON THE FACE OF A DEED: Where a deed is produced in evidence by a party claiming under it, and it appears upon its face to have been altered in a particular material to his interest, and to the prejudice of the other party, it is incumbent on him to establish by satisfactory evidence that the alteration was made by the grantor, or by his authority, or the deed will be deemed, for the purposes of the action, to read as it did before the alteration was made.—*Galland v. Jackman*, 26 Cal. 79, 85 Am. Dec. 172.

Section 4442. Books, Maps, etc., how far Evidence:

Historical works, books of science or art, and published maps or chart, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest.

1887 R. S. Sec. 5990.

INDISPENSABLE EVIDENCE.

Section 4443. Perjury and Treason, Proof of: Perjury and treason must be proved by testimony or more than one witness. Treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.

1887 R. S. Sec. 6005.

Section 4444. Will to be in Writing: A last will and testament, except a nuncupative will, is invalid, unless it be in writing and executed with such formalities as are required by law. When, therefore, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given.

1887 R. S. Sec. 6006.

Contest of wills, subscribing witness must be produced and examined if residing within county, otherwise, proof

of handwriting, etc., admitted: Sec. 4010.

Evidence to establish lost wills: See extended note 38 L. R. A. 433.

Section 4445. What Agreement Deemed Original: A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:

1. Where the promise is made by one who has received property or another on an undertaking to apply it pursuant to such promise; or by one who has received a discharge from an obligation in whole or in part, in consideration of such promise.

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligations in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made his surety;

3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor, or upon the consideration that the party receiving it releases the property of another from levy, or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person;

4. Where a factor undertakes, for a commission, to sell merchandise and guarantee the sale;

5. Where the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration and in connection with such transfer, enters into a promise respecting such instrument.

1887 R. S. Sec. 6010.

AGREEMENT, PRESUMPTION: Unless the agreement appears, from the complaint or pleadings, to have been verbal, the court will presume that it

was in writing, when the nature of the agreement is such that it could not be valid unless in writing; but when the party alleging the agreement comes to the proof of his allegations, he must

show such an agreement as is valid under the statute of frauds.—*Bowman v. Ainslie*, 1 Idaho, 644.

Under the statutes of Idaho a verbal contract for the sale or transfer of real estate is not admissible in evidence against a stranger.—*McGinniss v. Stanfield* (Idaho), 55 Pac. 1020; *Hillman v. Hardwick*, 2 Idaho, 983, 28 Pac. 438; *Geertson v. Barrack*, 2 Idaho, 1066, 29 Pac. 42; *Kirk v. Bartholomew*, 2 Idaho, 1087, 29 Pac. 40, cited and approved.

One Sullivan, being indebted to the plaintiff, and being about to leave the state, together with the defendant, and for the purpose of securing the payment to the plaintiff of the money so due to her from said Sullivan executed and delivered to James Burns, the brother of plaintiff, and acting as her agent, the following writings: "Pocatello, Idaho, March 4, 1897. I hereby authorize A. F. Caldwell to sell my property for \$2100.00, and pay James Burns \$500.00 in case the property can not be sold for any more in the next sixty days: (Signed.) Garrett Sullivan." "I hereby comply with the above in case there is a sale made of the property. I have full charge of the property. (Signed.) A. F. Caldwell." Held, that, upon a sale of the property as above set forth, defendant becomes liable to the plaintiff for the sum of \$500, and a right of action accrued to her therefor.

No question of guaranty can be predicated upon said writings, nor does the transaction come within the statute of frauds.—*Smith v. Caldwell* (Idaho), 55 Pac. 1065.

EXECUTORY CONTRACTS: Said section is applicable to executory contracts, and not to executed ones.—*Coffin et al. v. Bradbury et al.* (Idaho), 35 Pac. 712.

SALE: When none of the things are done, at the time the bargain is made, required to be done and performed under the provisions of Section 6009 Rev. St. 1887, to make a contract of sale out of its provisions, the contract can not be enforced against the purchaser, unless he thereafter receives and accepts the property purchased. A receipt and acceptance takes the contract out of the provisions of said section.—*Coffin et al. v. Bradbury et al.* (Idaho), 35 Pac. 715.

S. was a dealer in lumber, etc. M., desiring to purchase certain tanks to be used in mining operations, applied to S.

therefor, and on being informed that such articles were not kept by S., requested him to procure them for him from some house in Oregon or California, giving S. a description and specifications of the articles required, to be delivered free on board cars at Boise City, Idaho. S. ordered the articles from a house in Portland, O.; and, on not being at home on their arrival, S. stored them in the warehouse of N. On M.'s return S. notified him of the arrival of the goods, at the same time exhibiting to him the bill of lading thereof, and informing him where he had stored them. M. said "he guessed it was all right," and declining to examine the goods told S. he would remove them in a few days, and pay the balance due on them, and paid S. \$100 on the purchase price. Held, not to be a sale within Section 6009 Rev. St. Idaho.—*Shaw Lumber Co. v. Manville* (Idaho), 39 Pac. 559.

AGREEMENT, DEBT OF ANOTHER: An agreement by A., who has assets in his hands belonging to B., to apply the same for the benefit of C., who is a creditor of B., is not valid, and can not be enforced by C. against A. unless B. has authorized or consented to such application of such assets.—*Bowman v. Ainslie*, 1 Idaho, 644.

PROMISE TO PAY DEBT OF ANOTHER: Plaintiff was the proprietor of a meat market. Defendant was the owner of a boarding house, which he rented to tenant, who was a woman, and a stranger to plaintiff. Defendant introduced his tenant to plaintiff, and requested him to let her have such meats as she required and charge the same to him. Held, that defendant was liable for balance of account for meats so delivered to the tenant of defendant, the promise being an original one and not within the statute of frauds.—*Sears v. Flodstrom* (Idaho), 49 Pac. 11.

NOVATION, STATUTE OF FRAUDS: Where G. owes C., and M. owes G., C. demands payment of G. G. gives him an order on M. C. agrees to release G. provided M. accepts order. M. accepts the order, and pays \$45 thereon, and promises to pay balance at future time. M. is released as G.'s debtor, and becomes the debtor of C. M. thereby accepts C. as his creditor in place of G.—*Casey v. Miller* (Idaho), 32 Pac. 195.

Section 4446. Representation of Credit by Writing:

No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be charged.

CHAPTER CCI.

AFFIDAVITS.

Section.

4447. Affidavits, how taken.

4448. Evidence of publication, what.

4449. Where filed.

4450. Affidavits, before whom taken.

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4451. If out of state, before whom taken.

4452. If in foreign country, before whom taken.

4453. Certificate of clerk.

Section 4447. Affidavits, how Taken: An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other case expressly permitted by some other provision of this Code.

1887 R. S. Sec. 6052.

Section 4448. Evidence of Publication, what: Evidence of the publication of a document or notice required by law, or by an order of the court of judge, to be published in a newspaper, may be given by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when, and the paper in which the publication was made.

1887 R. S. Sec. 6053.

Section 4449. Where Filed: If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or a clerk thereof. If not so made, it may be filed with the recorder of the county where the newspaper is printed. In either case the original affidavit, or a copy thereof, certified by the judge of the court or officer having it in custody, is prima facie evidence of the facts stated therein.

1887 R. S. Sec. 6054.

Section 4450. Affidavits, Before whom Taken: An affidavit to be used before any court, judge or officer of this State, may be taken before any judge or clerk of any court, or any justice of the peace, or notary public in this State.

1887 R. S. Sec. 6055.

Territorial jurisdiction of judge and justice to take affidavits: Sec. 3032.

Section 4451. If out of State, Before whom Taken: An affidavit taken in another State or Territory of the United States, to be used in this State, may be taken before a commissioner appointed by the governor of this State, to take affidavits and depositions in such State or Territory, or before any notary public in such State or Territory, or before any judge or clerk of a court of record having a seal.

1887 R. S. Sec. 6056.

Section 4452. If in Foreign Country, Before whom Taken: An affidavit taken in a foreign country to be used in this State, may be taken before an ambassador, minister, consul, vice-

consul or consular agent of the United States, or before any judge of a court of record having a seal, in such foreign country.

1887 R. S. Sec. 6057.

Section 4453. Certificate of Clerk: When an affidavit is taken before a judge or a court in another State or Territory, or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof.

1887 R. S. Sec. 6058.

CHAPTER CCII.

WITNESSES.

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- 4474. Fees of witnesses in district court.
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ATTENDANCE.

Section 4454. Subpoena for Witness Defined: The process by which the attendance of a witness is required is a subpoena. It is a writ of order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control which he is bound by law to produce in evidence.

1887 R. S. Sec. 6035.

Subpoena justice court issues to any party of the county: Sec. 3690.

May be issued with blank space to be

filled: Sec. 3691.

Procuring ballot boxes, poll lists, etc.: Sec. 3809.

Section 4455. Subpoena, how Issued: The subpoena is issued as follows:

1. To require attendance before a court, or at the trial of an issue therein, it is issued in the name of the court before which the attendance is required, or in which the issue is pending:

2. To require attendance out of the court, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this State, it is issued by the judge, justice, or any other officer before whom the attendance is required;

3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of another State or Territory in the United States, or of any other district or county within this State, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge or justice of the peace in places within their respective jurisdiction, with like power to enforce attendance; and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpoena directed the attendance of the witness before their courts in a matter pending therein.

1887 R. S. Sec. 6036.

Section 4456. Subpoena, how Served: The service of a subpoena, is made by showing the original and delivering a copy, or a ticket, containing its substance, to the witness personally, or by leaving a copy with some suitable person at the place of his abode, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person.

1887 R. S. Sec. 6037.

Section 4457. Witness for State, Payment of Fees not Required: The attorney general or any prosecuting attorney is authorized to cause subpoenas to be issued and compel the attendance of witnesses on behalf of the state, without paying or tendering fees in advance to any officers or witnesses, and any witness failing or neglecting to attend, after being served with a subpoena may be proceeded against and shall be liable in the same manner as provided by law in other cases when fees have been tendered or paid.

1887 R. S. Sec. 2146.

Section 4458. How, if Witness be Concealed: If a witness is concealed in a building or vessel, so as to prevent the service of a subpoena upon him, any court or judge, or any officer issuing the subpoena, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena, and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

1887 R. S. Sec. 6038.

Section 4459. When Witness not Compelled to Attend: A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial.

1887 R. S. Sec. 6039.

Section 4460. Disobedience, how Punished: Disobedience to a subpoena, or a refusal to be sworn, or to answer as a wit-

ness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out,

1887 R. S. Sec. 6041.

Section 4461. Forfeiture Therefor : A witness disobeying a subpoena also forfeits to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend which forfeiture and damages may be recovered in a civil action.

1887 R. S. Sec. 6042.

Section 4462. Warrants may Issue to Bring Witness, when: In case of failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

1887 R. S. Sec. 6043.

Section 4463. Contents of Warrant: Every warrant of commitment, issued by a court or officer pursuant to this Chapter, must specify therein particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness pursuant to this Chapter, must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the district court.

1887 R. S. Sec. 6044.

Section 4464. If Witness be Imprisoned, how Brought: If the witness be a prisoner, confined in a jail or prison within this State, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer for the purpose of being orally examined, may be made as follows:

1. By the court itself in which the action or special proceeding is pending, unless it be a justice's court;
2. By a justice of the supreme court, judge of the district court or probate judge of the county where the action or proceeding is pending, if pending before a justice's court, or before a judge or other person out of court.

1887 R. S. Sec. 6045.

Section 4465. On whose Motion: Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

1887 R. S. Sec. 6046.

Section 4466. How Examined: If the witness be imprisoned in the county where the action or proceeding is pending, his

production may be required. In all other cases his examination, when allowed, must be taken upon deposition.

1887 R. S. Sec. 6047.

RIGHTS AND DUTIES.

Section 4467. Witness to Attend when Subpoenaed:

A witness, served with a subpoena, must attend at the time appointed, with any papers under his control, required by the subpoena, and answer all pertinent and legal questions, and, unless sooner discharged, must remain until the testimony is closed.

1887 R. S. Sec. 6090.

3013, 3034 and 3035.

Power to compel attendance: Secs. Contempt: Sec. 3819 et seq.

Section 4468. Persons Present Compelled to Testify:

A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer.

1887 R. S. Sec. 6040.

Section 4469. Witness Bound to Answer Questions:

A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony.

1887 R. S. Sec. 6091.

Witness election contest privileged:
Sec. 3808.

Section 4470. Protected from Arrest, when: Every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action, while going to the place of attendance, necessarily remaining there and returning therefrom.

1887 R. S. Sec. 6092.

Disobedience of subpoena or refusing to be sworn punishable as contempt, al-

so unlawfully detaining a witness while going to or returning from court: Sec. 3819.

Section 4471. Arrest Void, Contempt of Court. Damages: The arrest of a witness, contrary to the preceding Section, is void, and, when wilfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with the subpoena, for the damages sustained by him in consequence of the arrest.

1887 R. S. Sec. 6093.

Section 4472. To make Affidavit if Arrested: An officer is not liable to the party for making the arrest in ignorance

of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption, and make an affidavit stating:

1. That he has been served with a subpoena to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued; and,

2. That he has not thus been served by his own procurement, with the intention of avoiding an arrest;

3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena. The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested.

1887 R. S. Sec. 6094.

Section 4473. Court to Discharge Witness from Arrest: The court or officer issuing the subpoena, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of the provisions of this Chapter. If the court have adjourned before the arrest, or before application for the discharge, a judge of the court or a probate judge may grant the discharge.

1887 R. S. Sec. 6095.

FEES.

Section 4474. Fees of Witnesses in District Court: Witnesses in civil actions in the district court, or before any referee or commissioner thereof, are entitled to receive three dollars per day for each day's actual attendance, and twenty-five cents per mile one way; to be taxed as costs against the losing party.

1887 R. S. Sec. 6139.

Section 4475. Fees of, in Probate and Justices' Courts: Witnesses in civil actions in the probate and justices' courts are entitled to receive two dollars per day for each day's actual attendance, and twenty-five cents per mile one way; to be taxed against the losing party.

1887 R. S. Sec. 6140.

Section 4476. Fees of Interpreters: Interpreters are entitled to receive three dollars per day for each day's actual attendance upon a court of justice under a subpoena, and twenty-five cents per mile one way for each mile actually traveled, to be taxed as costs in civil actions, and in criminal actions to be paid out of the county treasury on the certificate of the clerk, judge, or magistrate, but the amount may be included in the costs taxed against a defendant upon conviction.

1887 R. S. Sec. 6141.

CHAPTER CCIII.

TAKING TESTIMONY OF WITNESSES.

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OATHS AND AFFIRMATIONS.

Section 4477. Certain Officers Authorized to Administer Oaths: Every court, every judge, or clerk of any court, every justice and every notary public, the secretary of the State and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations.

1887 R. S. Sec. 6127.

Authority of officer to administer:
 Secs. 3013 and 3034.

Section 4478. Form of Ordinary Oath to Witness: An oath or affirmation in an action or proceeding, may be administered as follows, the person who swears or affirms, expressing his assent when addressed, in the following form:

"You do solemnly swear (or affirm, as the case may be), that the evidence you shall give in the issue (or matter), pending betweenand..... shall be the truth, the whole truth, and nothing but the truth, so help you God."

1887 R. S. Sec. 6128.

Section 4479. Form may be Varied to Suit Belief: Whenever the court before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing, connected with or in addition to the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may, in its discretion adopt that mode.

1887 R. S. Sec. 6129.

Section 4480. Peculiar Ceremonies: When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

1887 R. S. Sec. 6130.

Section 4481. Persons who Prefer may Affirm: Any person who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting when ad-

dressed, in the following form: "You do solemnly affirm (or declare), that," etc., as above provided.

1887 R. S. Sec. 6131.

EXAMINATION.

Section 4482. Witnesses may be Excluded, when:

If either party requires it, the judge may exclude from the court room any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses.

1887 R. S. Sec. 6075.

Trial public except in certain cases:

court may exclude witnesses during examination: Sec. 3012.

Section 4483. Direct and Cross-Examination Defined: The examination of a witness by the party producing him is denominated the direct examination; the examination of the same witness, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct.

1887 R. S. Sec. 6076.

TRIAL, ORDER OF PROOF, DISCRETION OF COURT: It is a general rule that a defendant should not open the defense by a cross examination of

plaintiff's witnesses, but the application of this rule must rest largely in the sound discretion of the trial court. —Hopkins v. Utah Northern Railway Co. 2 Idaho, 277, 13 Pac. 343.

Section 4484. Leading Questions Defined: A question which suggests to the witness the answer which the examining party desires is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances, making it appear that the interests of justice require it.

1887 R. S. Sec. 6077.

FRAUDULENT CONVEYANCES: Where fraud is alleged in a transfer of personal property, and that it was transferred for the purpose of defrauding, delaying or hindering creditors, and facts appear in the evidence which have a strong tendency to sustain such allegation, much latitude is allowed in the examination of the parties to the transfer, and others in any wise connected with the affair.—Ferbrache v. Martin (Idaho), 32 Pac. 252.

NEGLIGENCE, EXPERT EVI-

DENCE: An expert witness can not be asked to determine a question of negligence, whether a certain structure is safe, or whether certain methods are prudent, but facts may be elicited from such witness from which the conclusion inevitably follows, and if negligence is fully proven by other evidence, the defendant is not prejudiced by the form of the question put to the expert. —Giraudi v. Electric Improvement Co. 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114.

Section 4485. Witness may Refresh Memory from

Notes: A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So also a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution.

1887 R. S. Sec. 6078.

WITNESS, EXPLANATION OF STATEMENT: It is not error to permit a witness to make an explanation of statements made by him on the witness stand, or to permit him to correct any mistake he may have made in giving his evidence, care being exercised to prevent such witness straying away from the issues, or making improper statements.—*Giffin et ux. v. City of Lewiston (Idaho)*, 55 Pac. 545.

REFRESHING MEMORY FROM PASS BOOK: Under a statute providing that "a witness is allowed to refresh his memory respecting a fact by anything written by himself or under his

direction at the time when the fact occurred," a witness may refresh his memory from a bank book in which entries of his deposits and drafts were made or verified in his presence.—*McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149.

A witness may refer, in illustration of his testimony concerning the size and condition of a revolving shaft to a piece of iron about the same dimensions as such shaft, if he does not pretend that it is a model and the jury is so informed.—*Davis v. Pacific Powder Co.* 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156.

Section 4486. Rule of Cross-Examination: The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions; but if he examine him as to other matters such examination is to be subject to the same rules as a direct examination.

1887 R. S. Sec. 6079, amended 1889, 15th Ses. p. 6.

In the trial of a criminal action, as in this case, a charge of robbery, the defendant should be permitted, upon cross examination of prosecuting witness, to interrogate such witness as to any matters connected with the transaction.—*State v. Webb (Idaho)*, 55 Pac. 892.

A defendant in a criminal action, if he voluntarily takes the witness stand, and testifies in his own behalf, may be cross examined about any facts testified to on his direct examination, or connected therewith.—*State v. Larkins (Idaho)*, 47 Pac. 945.

A witness can not be asked on cross

examination, for the purpose of affecting her credibility, whether or not she is addicted to the morphine habit, unless it is proposed to show that the witness was under the influence of the drug at the time the events happened about which she testifies, or unless she is under its influence at the time she is testifying, or unless it is made to appear that her powers of recollection are impaired by the habitual or excessive use of the drug.—*State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655.

As to physical examination of parties by order of court, see note 68 Am. St. Rep. 242.

Section 4487. Witness, how Examined: A witness once examined cannot be re-examined as to the same matter without leave of court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion.

1887 R. S. Sec. 6081.

Under the provisions of Section 6081, Rev. St. after the examination of a witness has been concluded on both sides, the witness may be recalled for further examination.—*Anthony v. State (Idaho)*, 55 Pac. 884.

EVIDENCE IN ACTIONS FOR DIVERTING WATER: In an action for the wrongful diversion of water, where the answer sets up more than five years continuous adverse possession in the

defendant, if the plaintiff before resting introduces evidence to sustain the answer, the plaintiff, in rebuttal, may introduce evidence to show that defendant's possession had not been continuous, or uninterrupted, or adverse, but he can not claim as a right to introduce evidence to prove the same facts that were proved in his opening.—*Union Water Co. v. Crary*, 25 Cal. 564, 85 Am. Dec. 145.

Section 4488. Writing Shown Witness, Inspection by Opposite Party: Whenever a writing is shown to a witness, it may be inspected by the opposite party, and if proved by the wit-

ness, must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness.

1887 R. S. Sec. 6085.

Writing produced by adverse party, party calling for need not introduce: Sec. 4433.

Provision to obtain inspection of writing in an adverse party's hands, exclusion, then refused and presumption: Sec. 3705.

IMPEACHMENT AND CHARACTER EVIDENCE.

Section 4489. Party Producing not Allowed to Impeach: The party producing a witness, is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times, statements inconsistent with his present testimony.

1887 R. S. Sec. 6080.

State v. Corcoran (Idaho), 61 Pac. 1034.

Section 4490. How Impeached: A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony.

1887 R. S. Sec. 6082.

CONTRADICTORY STATEMENTS: The credibility of a witness may be impeached by proof that he has made statements relevant to the issues out of court contrary to what he has testified to on the trial.—Anthony v. State (Idaho), 55 Pac. 884.

EVIDENCE OF PARTICULAR ACTS: Under the provisions of Section 6082, Rev. St. a witness may be impeached, (1) by contradictory evidence; (2) by evidence that his general reputation for truth, honesty, or integrity is bad; but can not be impeached by evidence of particular wrongful acts, except that it may be shown by the examination of the witness or the record of the judgment that the witness had been convicted of a felony.

Under the facts of this case, it was error to compel the defendant to answer questions concerning an alleged attempt to debauch a child, which matter was not connected in the remotest degree with the crime for which the defendant was being tried.—Anthony v. State (Idaho), 55 Pac. 884.

OPINIONS AS TO VERACITY: A witness can not be asked to state if he knows whether the prosecutrix is a truthful girl, as such question calls for the opinion of the witness.—People v. Barnes, 2 Idaho, 148, 9 Pac. 532.

WITNESS, IMPEACHMENT: Defendant in a criminal case who has been a witness in his own behalf may be impeached by evidence as to his general reputation.—People v. Bently, 77 Cal. 7, 18 Pac. 799, 11 Am. St. Rep. 225.

Section 4491. Impeachment by Inconsistent Statements: A witness may also be impeached by evidence, that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

1887 R. S. Sec. 6083.

STATEMENTS AND ADMISSIONS: Statements and admissions made by a party to a suit, may be put in evidence by the opposite party, without calling the party's attention to them or laying any foundation for impeachment.—

Coffin v. Bradbury (Idaho), 35 Pac. 715.

WITNESSES, IMPEACHMENT: Evidence that a witness, long prior to the trial, made statements consistent with his testimony is not admissible when he has been impeached by evidence of his bad reputation, to rebut

the effect of such impeaching evidence. *Mason v. Vestal*, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310.

Prior statements made by a witness may be received in evidence when the adverse party has sought to impeach him by showing that he was testifying under some motive, and that his account is a fabrication of a late date, if such prior statements were made before the motive imputed to him could have existed.—*Barley v. Copeland*, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413.

Witness may be impeached by evi-

dence that different statement was made by him to others from that he made upon oath, where he acted as interpreter and attorney for the grantor and defendant, in executing a deed, and testified for the plaintiff, from whom he received a subsequent deed for part of the land, in an action involving the amount of land conveyed, in regard to his reading over the deed to the grantor, and to the grantor's admission of the quantity of land he had agreed to convey.—*McDaniel v. Baca*, 2 Cal. 326, 56 Am. Dec. 339.

Section 4492. Character: Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness had been impeached, or unless the issue involves his character.

1887 R. S. Sec. 6084.

CHAPTER CCIV.

TAKING TESTIMONY OUT OF COURT.

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4494. Notice to be mailed and published.

4495. Taking of, May be continued.

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4496. Testimony to be transcribed, objections.

Section 4493. Testimony may be Taken on Order of Judge: In all actions in the district court which are triable by the court or in which a jury is waived, where the parties are numerous and the convenience of the witnesses and the ends of justice would be promoted thereby, the court, or the judge thereof at chambers, may at any time after the service is complete and the time for appearance has expired, order testimony taken at such time and place as shall be designated in such order, before the judge of said court or before a referee appointed by said court or the judge thereof, or before a special judge agreed upon by the parties to the action.

1901, 6th Ses. p. 132.

Section 4494. Notice to Mailed and Published: A copy of said order, designating the time place for taking such testimony shall be mailed by the clerk to each of the attorneys who shall have appeared in the action, and shall be published for two consecutive weeks in some newspaper to be designated in such order.

1901, 6th Ses. p. 132.

Section 4495. Taking of, may be Continued: Costs: The taking of testimony may be continued from day to day and adjourned by order of the judge of the court or by the referee or special judge before whom the testimony shall be taken, and the judge of said court shall make such order as he may deem proper as to payment of costs incurred in taking and transcribing such testimony.

1901, 6th Ses. p. 132.

Section 4496. Testimony to be Transcribed; Objections: The testimony so taken shall be transcribed by the court reporter and transmitted, without findings, to the clerk of the court of the county where said action is pending, and shall be received in court as evidence in said action with the same force and effect as if taken upon a trial of said cause in open court. All objections made at the time as to the relevancy or admissibility of evidence shall be noted, and the same may be renewed in the district court upon the final hearing.

1901, 6th Ses. p. 132.

CHAPTER CCV.

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Section 4497. Depositions, Before Whom Taken:

Depositions of witnesses, taken within or without the State, may be taken according to the regulations hereinafter provided, before any judge, justice of the peace, notary public, mayor or recorder of a city, clerk of a court of record, or commissioner appointed by the court to take depositions; but depositions shall not be taken before any person or the kin of any person interested in the action.

1899, 5th Ses. p. 215, Sec. 1.

Section 4498. When may be Taken: In all actions, depositions may be taken by either party in vacation or term time; at any time after service of summons, without order of court therefor.

1899, 5th Ses. p. 216, Sec. 6, part of.

Section 4499. Order for Taking Depositions: In all actions, the court may order the taking of depositions, whenever deemed necessary to determine the rights of the parties or to expedite the trial of causes; and may if necessary for that purpose, order a continuance until the next term.

1899, 5th Ses. p. 216, Sec. 5.

Section 4500. Commission Unnecessary within United States: When a deposition is to be taken within or without the State, but within the United States, no commission shall be necessary for taking the deposition. When taken out of the United States, the clerk shall upon the request of the party taking the deposition issue a commission to the officer or commissioner designated to take the deposition. No order of the court or affidavit shall be necessary to authorize the issuing of the commission.

1899, 5th Ses. p. 217, Sec. 16.

NOTICE. ATTENDANCE OF PARTIES.

Section 4501. Notice. Specifications Required: A party wishing to take depositions shall give notice to the adverse party, if there be only one person; if there be several, to any one of them who is a real party in interest, his agent or attorney. Such notice shall specify:

FIRST. The cause or matter in which the deposition is to be used.

SECOND. The court or tribunal in which the trial is to be had.

THIRD. The time and place of taking the deposition, and the names of the witnesses.

1899, 5th Ses. p. 215, Sec. 2.

Section 4502. Time Allowed Adverse Party: The adverse party shall be allowed one day for each twenty miles required to be traveled from his usual place of abode to the place of taking the deposition by the ordinary route of travel, not exceeding, however, thirty days in all. If served on an attorney or agent a reasonable time shall be allowed him to communicate the same to the party not exceeding ten days in all.

1899, 5th Ses. p. 373.

Section 4503. Service of Notice: The notice may be served in the same manner, and by any person authorized to serve a subpoena for a witness. If neither the party nor his agent or attorney reside in the State, the notice may be filed in the clerk's office, and be published three weeks successively in the county in which the suit is pending and a copy thereof mailed to each party or his attorney at his last known address, and personal service without the State shall be equivalent to filing such notice with the clerk and publication as herein provided.

1899, 5th Ses. p. 215, Sec. 4.

Section 4504. Postponement: When notice is given fixing the time of taking any deposition on a day in term time, the court, may if in session, or the judge thereof in vacation on notice

given by the adverse party of the time and place of hearing the motion, fix another day for such taking, and the court on the hearing of such motion, may fix the time for such taking, from which there shall be no appeal.

1899, 5th Ses. p. 216, Sec. 6, Sub. 5.

Section 4505. Costs, Causing Unnecessary Attendance: When a party shall, in response to a notice to take depositions orally, attend at the time and place, by himself or attorney and the deposition shall not be taken, he shall upon notice and affidavit of the facts have judgment against the party at whose instance the notice was given, for two dollars per day for each day he may attend under the notice and six cents per mile for the distance necessarily traveled, in going to and returning from the place fixed for taking depositions unless it shall be shown that the failure to take such depositions did not result from the negligence or fault of the party giving the notice, or had previously notified the opposite party that he could not attend such taking.

1899, 5th Ses. p. 219, Sec. 30.

MANNER OF TAKING AND AUTHENTICATION. FILING.

Section 4506. Compelling Witnesses Attendance: The officer taking the deposition shall have power to summon and compel the attendance of witnesses. In case of the refusal of a witness to attend or testify, such fact shall be reported by the officer to any probate or district court of the county, or the judge thereof and such court or judge shall order such witness to attend and testify; and on the failure or refusal to obey such order, such witness shall be dealt with as for a contempt.

1899, 5th Ses. p. 216, Sec. 9.

Section 4507. Witnesses out of County: A witness is not obliged to attend for examination upon a deposition in any other county than that of his residence, but may consent to do so.

1899, 5th Ses. p. 216, Sec. 7.

Section 4508. Oaths and Examinations: The deponent shall first be sworn by the officer to testify to the truth, the whole truth, and nothing but the truth relating to the cause or matter for which the deposition is to be taken; and he shall then be examined by the party producing him, and then by the adverse party, and by the officer or parties afterwards if they see cause.

1899, 5th Ses. p. 216, Sec. 11.

Section 4509. Taking and Subscribing: The deposition shall be written down by the officer, or by the deponent, or by some disinterested person, in the presence and under the direction of the officer; and after the same has been carefully read to or by the deponent, it shall be subscribed by him.

1899, 5th Ses. p. 216, Sec. 12.

Section 4510. Objections: Objections to the competency of a deponent, or to the propriety of any question proposed to him

or answers given by him, may be made at the time of taking his deposition, or in court whether made at the taking of the deposition or not.

1899, 5th Ses. p. 217, Sec. 20.

Section 4511. Certificate, Facts Required, Stated:

The officer shall annex his certificate to the deposition stating the following facts:

FIRST. That the deponent was sworn according to law.

SECOND. By whom the deposition was written, and if written by the deponent or some disinterested person; that it was written in the presence and under the direction of the officer.

THIRD. Whether or not the adverse party attended.

FOURTH. The time and place of taking the deposition, and the hours between which the same was taken. And the officer shall sign and attest the certificate, and seal the same, if he have a seal of office.

1899, 5th Ses. p. 216, Sec. 13.

Section 4512. Authenticating Commissions, Official Character:

When the commission contains the name of the officer before whom the deposition is to be taken his attestation, officially certifying the same, shall be sufficient; but if the commission do not specify the name of the officer, and he have no official seal, his certificate shall be authenticated by the certificate and seal of the clerk or prothonotary of any court of record of the county in which the officer exercises the duties of his office.

1899, 5th Ses. p. 217, Sec. 17.

Section 4513. Sealing, Directing and Indorsing:

The officer taking the deposition shall seal up the same in a secure envelope, and direct the same to the clerk of the court in which the action is pending indorsing upon the envelope the names of the parties and of the witnesses whose depositions are inclosed.

1899, 5th Ses. p. 217, Sec. 14.

DEPOSITIONS, ADMISSIBILITY: In determining the admissibility of a deposition taken under the provisions of the Code of Civil Proc. Idaho, presumption

is that the commissioner discharged his duty by doing all that the statute requires except as to matters that he must return specifically as done,—*Darby v. Heagerty*, 2 Idaho, 260, 13 Pac. 85.

Section 4514. Time of Filing: Every deposition intended to be read in evidence must be filed in the court at least one day before the time at which the cause in which the deposition is to be used stands on the docket for trial; or, if filed afterward and claimed to be used on the trial, the adverse party shall be entitled to a continuance, at the cost of the party filing the deposition upon showing good cause by affidavit.

1899, 5th Ses. p. 217, Sec. 18.

Section 4515. Publication: Depositions, after being filed, may be published by the clerk, at the request of either party after giving the other, his agent or attorney, reasonable notice of the time of publication or they may be published by order of the court on motion of either party.

1899, 5th Ses. p. 217, Sec. 19.

COMPETENCY AND OBJECTIONS.

Section 4516. Under What Circumstances Used :

They may be used in the trial of all issues, in any action in the following cases:

FIRST. When the witness does not reside in the county, or when he resides in a county adjoining and more than thirty miles from place of trial, or is absent from the State.

SECOND. When the deponent is so aged, infirm, or sick as not to be able to attend the court or place of trial, or is dead.

THIRD. When the depositions have been taken by agreement of parties, or by the order of the court trying the cause.

FOURTH. When the deponent is a State or county officer, or judge, or a practicing physician, or attorney-at-law, and the trial is to be had in any county in which the deponent does not reside. In either of the foregoing cases the attendance of the witness cannot be enforced.

1899, 5th Ses. p. 216, Sec. 6, part of.

Section 4517. Witnesses Present; Deposition Incompetent:

No deposition shall be read in evidence on the trial of a cause, if at that time the witness is produced in court, unless the deposition has been taken by the agreement of the parties, or by the order of the court.

1899, 5th Ses. p. 216, Sec. 8.

Section 4518. Inadmissible Unless Existing Cause :

When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that the cause for taking and reading it still exists.

1899, 5th Ses. p. 217, Sec. 15.

Section 4519. Dismissal, New Action:

When an action has been dismissed and another action has been commenced for the same cause the deposition taken in the first action may be used in the second or any other action between the parties, or their assignees or representatives for the same cause; but it must appear that the depositions have been duly filed in the court where the previous cause was pending, and have remained on file from the time the action was dismissed until the time at which it was proposed to use them.

1899, 5th Ses. p. 217, Sec. 22.

Section 4520. Objection; when Waived; Suppressing Deposition:

All objections to the validity of any deposition or its admissibility in evidence, shall be made before entering upon the trial, not afterward. But any deposition after the commencement of trial may be suppressed, if any matter which is not disclosed in the deposition appears which is sufficient to authorize such suppression.

1899, 5th Ses. p. 217, Sec. 21.

Objections to competency of witnesses, etc.: Sec. 4510.

Section 4521. Unimportant Deviation Disregarded:

An unimportant deviation from any direction relative to taking depo-

sitions shall not cause any deposition to be excluded where no substantial prejudice would be done to the opposite party.

1899, 5th Ses. p. 218, Sec. 29.

DEPOSITIONS UPON WRITTEN INTERROGATORIES.

Section 4522. Taking upon Written Interrogatories:

The deposition may be taken upon written interrogatories as follows: The party desiring to take such deposition shall serve upon the opposite party notice of his intention together with a copy of the interrogatories which he intends to propound and file such notice and interrogatories with the clerk. The opposite party shall file with the clerk within five days thereafter such cross-interrogatories as he desires to propound and re-examine interrogatories served and filed within five days thereafter. The clerk shall then issue to some officer, by him to be selected, authorized to take depositions, a commission with the interrogatories, cross-interrogatories, and re-examining interrogatories annexed thereto, requiring him to cause the witness to come before him at such time and place as he may appoint, and to faithfully take his deposition, upon the questions annexed to the commission, and thereupon to make return to the court of his doings under such commission without delay. The officer shall first swear or affirm the witness that he will make a true, full and perfect answer to the interrogatories to be propounded to him; and then he shall propound the annexed to the commission in their order and accurately write the answers of the witness to such. He shall then read carefully to the witness such interrogatories and his answers thereto, and correct the answers as the witness may desire and then the witness shall sign such deposition. The officer shall annex to the deposition his certificate, showing specifically a fulfillment of each of the requirements of this Section; and shall then enclose the deposition with the commission, interrogatories and answers securely sealed, and transmit the same addressed to the clerk of the court in which the suit is pending with the title of the cause endorsed thereon; *Provided, however,* That additional oral testimony may be adduced by either party, upon not less than three days notice to the opposite party, and the commission and officer's certificate shall be modified accordingly.

1899, 5th Ses. p. 219, Sec. 31.

TO BE USED IN OTHER STATES.

Section 4523. Deposition in this State to be Used in Other States: Any party to an action or special proceeding in a court, or before a judge of another State or Territory, may obtain the testimony of a witness residing in this State to be used in such action or proceeding, in the cases mentioned in the next two sections.

1887 R. S. Sec. 6071.

Section 4524. How to Procure Witness upon Commission: If a commission to take such testimony has been issued from the court or judge before whom such action or proceeding is

pending, on producing the commission to a district or probate judge, with an affidavit satisfactory to him of the materiality of the testimony, he may issue a subpoena to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place.

1887 R. S. Sec. 6072.

Section 4525. How, if no Commission: If a commission has not been issued, and it appears to a district or probate judge, or justice of the peace, by affidavit satisfactory to him:

1. That the testimony of the witness is material to either party;
2. That a commission to take the testimony of such witness has not been issued;
3. That according to the law of the State or Territory where the action or special proceeding is pending, the deposition of a witness taken under such circumstances, and before such judge or justice, will be received in the action or proceeding:—He must issue his subpoena, requiring the witness to appear and testify before him at a specified time and place.

1887 R. S. Sec. 6073.

Section 4526. Depositions, how Taken: Upon the appearance of the witness, the judge or justice must cause his testimony to be taken in writing, and must certify and transmit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that state or territory requires.

1887 R. S. Sec. 6074.

Section 4527. Provisions also Apply Within this State: The provisions of section 4506 shall extend to all officers and commissioners authorized to take depositions in this state to be read in the courts of other states or countries.

1899, 5th Ses. p. 216, Sec. 10.

OFFER OF PERFORMANCE.

Section 4528. Offer in Writing Equivalent to Tender when: An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

1887 R. S. Sec. 6110.

A tender in writing under the statute is "equivalent to the actual production and tender of the money." To have this effect, however, the party tendering must have the ability to produce it, and must act in good faith.—*Hyams v. Bamberger*, 10 Utah, 3, 36 Pac. 202. Nor does such a tender deprive the creditor of the allowance of a reasonable time in which to ascertain the amount due, and to determine whether he will accept; and if he accepts and the debtor fails to produce the money, his tender

will be of no avail.—*Hyams v. Bamberger*, *supra*, citing, *Startup v. McDonald*, 46 E. C. L. 623; *Moynahan v. Moore*, 77 Am. Dec. 483; *Proctor v. Robinson*, 35 Mich. 284, and others.

Where a person makes a tender in writing, the statute excuses him from actually producing the money at the time of making the tender, but it excuses no other act or requirement on his part which would be necessary to make a valid tender, independently of the statute.—*Hyams v. Bamberger*, *supra*.

Section 4529. Debtor may Demand Written Receipt:

Whoever pays money, or delivers an instrument or property whether in performance of an obligation or otherwise, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery.

1887 R. S. Sec. 6111.

The receipts and relinquishments signed by the defendants, although made without the knowledge or consent of the attorneys of record, are testimony in favor of the plaintiffs, and it is error for the trial court to refuse to receive them.—*Pence v. Sweeney*, 2 Idaho, 914.

In a suit growing out of a contract of settlement which is not reduced to writing, the contract itself may be proved, although the evidence proving it contradicts recitals in a receipt connected with the transaction.—*Barghoorn v. Moore* (Idaho), 57 Pac. 265.

CHAPTER CCVI.**PROCEEDINGS TO PERPETUATE TESTIMONY.****Section.**

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4531. Manner of application.

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4533. Manner of taking deposition.

4534. Papers filed prima facie evidence.

4535. When evidence may be produced.

4536. Effect of deposition.

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4537. Perpetuating testimony.

4538. Manner of taking.

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4540. Publication. Entry upon court's records.

4541. Using record.

4542. When admissible.

Section 4530. Evidence may be Perpetuated: The testimony of a witness may be taken and perpetuated as provided in this chapter.

1887 R. S. Sec. 6116.

Section 4531. Manner of Application: The applicant must produce to a district judge, or to a probate judge, a petition verified by the oath of the applicant, stating:

1. That the applicant expects to be a party to an action in a court in this state, and, in such case, the names of the persons whom he expects will be adverse parties; or,

2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which it may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such petition is presented must make an order allowing the examination and designating the officer before whom the same must be taken, and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this state, must be personally served, and if unknown, such notice must be served on the recorder of the county where the property to be affected by the evidence is situated, or the judge making the order resides, as may be directed by him and by publication thereof in

some newspaper, to be designated by the judge, for the same period required for the publication of summons. The judge must also designate in his order, the recorder of the county to whom the depositions must be returned when taken.

1887 R. S. Sec. 6117.

Section 4532. Appointee of Judge. Authority of:

The person appointed by the judge to take the depositions is authorized, if a resident of this state, on receiving a copy of the order of the judge, and of the notice prescribed in the last section, with proof of its personal service or publication; or, if a resident without the state, on receiving the commission mentioned in the next section, with proof of like service or publication of the notice; to take the deposition of the witness named in the order of the judge, or in the commission, or, if more than one witness is thus named, of such of them as appear before him, at the time designated, and the taking of the same may be continued from time to time.

1887 R. S. Sec. 6118.

Section 4533. Manner of Taking Deposition: The examination must be by question and answer, and if the testimony is to be taken in another state or territory, it must be taken upon a commission, to be issued by the judge, allowing the examination, under the seal of the court of which he is judge, and upon interrogatories, to be settled in the same manner as in cases of depositions taken under commission in pending actions, unless the parties expectant, if known, otherwise agree. If such parties are unknown, notice of the settlement of the interrogatories shall be published in some newspaper for such time as the judge may designate. The deposition, when completed, must be carefully read to and subscribed by the witness, then certified by the officer or person taking the same, and shall then be sealed up and delivered or transmitted to the recorder of the county designated in the order of the judge allowing the examination, who shall file the same when received. The judge allowing the examination shall file with the recorder the order for the examination, the petition on which the same was granted, with proof of service of the order and notice.

1887 R. S. Sec. 6119.

Section 4534. Papers Filed, Prima Facie Evidence:

The petition and order, and papers filed by the judge, as provided in the last section, or a certified copy thereof, are prima facie evidence of the facts stated therein to show compliance with the provisions of this chapter.

1887 R. S. Sec. 6120.

Section 4535. When Evidence may be Produced:

If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of the death, or insanity of the witness, or that they cannot be found, or are unable, by reason

of age, or other infirmity, to give their testimony, the depositions or copies thereof may be used by either party, subject to all legal objections; but if the parties attend at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination.

1887 R. S. Sec. 6121.

Section 4536. Effect of Deposition: The deposition so taken and read in evidence has the same effect as the oral testimony of the witness, and no other, and every objection to the witness, or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial.

1887 R. S. Sec. 6122.

Section 4537. Perpetuating Testimony: Whenever any person shall make affidavit before any probate or district court or judge thereof, or the clerk of the court, that such person expects to be made a party in any action thereafter to be commenced, and that the testimony of the affiant, or any other person, whether residing within or without the state to be named in the affidavit, is material and necessary to the prosecution or defense thereof, the court or officer before whom the affidavit is made shall order notice as provided by section 4501 to be given to the party expected to be adverse to the applicant, or his attorney that on the day and at the place in such notice to be expressed, the witness will be examined before such officer as shall be specified in the order.

1899, 5th Ses. p. 218, Sec. 23.

Section 4538. Manner of Taking: Upon proof that the notice has been given, either by personal service or by advertisement as provided by section 4503 being made to the officer authorized to take the testimony he shall proceed to take and certify, and seal up, and return the deposition according to the rules provided for other depositions in this title.

1899, 5th Ses. p. 218, Sec. 24.

Section 4539. Certifying, Sealing and Filing: Every deposition, so taken and certified shall, in due course be filed in the office of the clerk of the proper court of the county where the subject matter of such expected suit may be situated. The clerk shall file such deposition, and it shall remain sealed until after commencement of such expected action and until published as provided by section 4667.

1899, 5th Ses. p. 218, Sec. 25.

Section 4540. Publication, Entry upon Court's Records: Any deposition which has heretofore been taken and filed for the purpose of perpetuating in pursuance of any existing or former statutes of this state, as well as any deposition which may hereafter be taken and filed to perpetuate testimony may, at any time, either before or after the commencement of the action in anticipa-

tion of which such deposition may have been taken be published by order of the court in the office of whose clerk the same may be filed, on the motion of any person or party interested in the preservation of the testimony and such deposition with all the accompanying affidavits, orders, notices, and other documents shall be directed by such court to be entered of record in the order book of such court, at the cost of the party making such motion and such record shall contain a statement or recital of the date of the filing of such deposition.

1899, 5th Ses. p. 218, Sec. 26.

Section 4541. Using Record: The record of any deposition recorded under the provisions of the last section, and copies of such record, duly certified, may be used as evidence whenever and wherever the original deposition might be used.

1899, 5th Ses. p. 218, Sec. 27.

Section 4542. When Admissible: Upon the proof of death, insanity, or absence from the state of such witness, or distant more than thirty miles from the place of trial or inability by reason of age or infirmity to attend, the deposition, or a certified copy thereof by the clerk of the court where the same is filed, shall be admitted as evidence in any court in this state, in any cause between the parties named in the affidavit or in any cause between persons claiming under either of said parties and shall have like effect as if the witness had been personally present, and given oral testimony therein, saving the right of exception in all cases on account of the incompetency of the witness or any part of the testimony contained in the deposition.

1899, 5th Ses. p. 218, Sec. 28.

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